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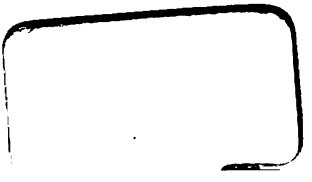

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# PRECEDENTS

IN

# P L E A D I N G:

WITH

## Copious Notes

ON

## PRACTICE, PLEADING AND EVIDENCE.

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BY

JOSEPH CHITTY, JUN. Esq.

OF THE MIDDLE TEMPLE.

---

FIRST AMERICAN FROM THE FIRST LONDON EDITION.

*IN TWO VOLUMES.*

VOL. II.

EDITED BY

HENRY PEARSON, ESQ.

AND

TOMPSON CHITTY, ESQ.

OF THE MIDDLE TEMPLE.

SPRINGFIELD:

PUBLISHED BY G. AND C. MERRIAM.

1839.

# PREFACE.

THE untimely death of Mr. Joseph Chitty, Jun. in April last, has prevented the earlier appearance of the Second Volume of this Work; at the period alluded to, all the Forms and Notes contained in the *Second* Volume had been prepared for the Press under the immediate superintendence of the Author; but from a wish to make the Work as perfect as possible, he intended to cancel all those Forms in the *First* Volume, which recent decisions on the New Rules of Pleading had rendered demurrable or doubtful; he did not however survive to do more than to mark each page which he intended to expunge, and to write some portion of the observations (now first published) on the effect of the General Issues in Assumpsit and Debt as settled by the most recent decisions, (see pages 203 to 205,) the latter, the present editors have completed; and being in possession of Mr. Chitty's private copy of the First Volume of this Book, they were enabled at once to select those pages which Mr. Chitty himself considered objectionable, these they have carefully re-written, and they have brought down the Notes contained in them to the latest decisions, and included the New Rules of Pleading of last Trinity Term:—see particularly the Titles "Common Counts in Assumpsit," "Attornies," "Court of Conscience," "De Injuria," "Payment," "Rescinded Contract," and "Set-off." These substituted pages are, in the present edition, inserted in their proper places. The editors have been thus minutely anxious to explain precisely what they have themselves done, in order that, in justice to their deceased Friend, the errors and imperfection of those parts of the Work may not rest upon his memory.

The present Volume consists of very copious Precedents in Covenant, Detinue, Case, Trover, Trespass, and Ejectment, in connection with a body of law in the Notes more extensive and explanatory, than has even been attempted before in any similar Work.

The Editors have also prepared a full Index to the Precedents contained in both Volumes of the Work, which, with the alphabetical arrangement adopted by the Author, will, it is hoped, render the contents easily accessible.

TOMPSON CHITTY,
HENRY PEARSON.

TEMPLE, *August*, 10, 1838.

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# PRECEDENTS IN PLEADING.

# PRECEDENTS, &c.

## *VOL. II.*

## COVENANT—DECLARATIONS IN.(*a*)

### ANNUITY DEEDS.(*b*)

*The commencement will be in the common* form, *see ante*, 1, 6, 7, *stating* "in an action of covenant," *and the declaration will be similar to the form*

(*a*) Covenant is a personal action for the recovery of damages, occasioned by the breach of a covenant or promise *under seal*. It cannot be maintained except upon a specialty. See in general Com. Dig. and Bac. Ab. tit. "Covenant;" 1 Chit. Pl. 6th ed. 115; Selw. N. P. tit. "Covenant;" Platt on Cov. 14; *per* Tenterden, C. J. in Burnett *v.* Lynch, 5 B. & C. 602; Hawkins *v.* Sherman, 3 C. & P. 462. In general, debt lies upon a specialty for the non-payment of money; *ante*, 414, note (*a*); but covenant is the only remedy upon a deed where the action is not brought for the breach of a covenant to pay money.

Covenant lies on an express covenant, or upon a covenant implied by law from particular words used in a deed, as upon the word "*demise*," &c. in a lease, as importing a covenant by the lessor, that the lessee should quietly enjoy, &c. where there is no express covenant on the subject; see Burnett *v.* Lynch, 5 B. & C. 609; Adams *v.* Gibney, 6 Bing. 666; and Wolveridge *v.* Steward, 1 C. & M. 644. See another instance, *post*, tit. "Partners."

Debt is the proper form of action in the case of *bonds*.

In general the covenantee may maintain covenant, although he has not executed the deed; 1 Chit. Pl. 119, 6th ed.; see Cardwell *v.* Lucas, 2 M. & W. 111; and if there be two, and one has not concurred, but has not disclaimed, both should join; Petrie *v.* Bury, 5 D. & R. 152; 3 B. & C. 353. Covenant lies upon a deed *inter partes*, only between the parties thereto: a stranger, though made a covenantee, cannot sue thereon; Barford *v.* Stuckey, 1 Bing. 225; 8 Moor, 88; Berkeley *v.* Hardy, 5 B. & C. 355; Lord Southampton *v.* Brown, 6 B. & C. 718.

In covenant the *venue* is in general transitory. It is local in actions on leases, in certain cases, see *post*, 468, note (*f*). The declaration should state, that the deed is sealed with the defendant's seal, and make, or give an excuse for not making, a *profert* thereof; see *ante*, 33, note (*a*); 417, note (*r*). The covenant declared upon is usually set out *verbatim* in the past tense, but it may be stated according to its legal effect, and perhaps this is strictly the more formal course; see Steph. on Pl. 3d ed. 311, 391.

In stating *title* to realty through the medium of conveyances, &c. it is a technical rule that the deeds should be pleaded as they operate; see *id.*; *post*, 468, note (*f*). The declaration should not notice irrelevant covenants, but it should contain an averment of the plaintiff's performance of any matters, which, upon the true construction of the deed, constitute a *condition precedent* to the defendant's liability upon his covenant; as if a lessee covenant to repair, "on being provided with timber," the declaration against him must show that the lessor provided or was willing and offered to provide timber; Thomas *v.* Cadwallader, Willes, 496; 2 Saund. 352 *c*.

The *breach* of covenant may be charged in a general form in the words of the deed: that is, the very words of the covenant, constituting the liability, may usu-

*in debt*, †*ante*, 416, *omitting the allegation*, "whereby an action hath accrued," *&c. and the averment of nonpayment which follows that allegation. See form, &c. against surety*, Hearn *v.* Cole, 1 Dow. 459, 463.]

## APPRENTICES.

See forms of declarations in covenant upon indentures of apprenticeship, 2 Chit. Pl. 5th ed. 517, 6th ed. 342; Hughes *v.* Humphreys, 6 B. & C. 680; 9 D. & R. 715. As to the law upon this subject, see Burn J. tit. "Apprentices;" Harr. Ind. tit. "Apprentices." The apprentice, if under age, cannot be sued upon the deed; Gilbert *v.* Fletcher, Cro. Car. 179; see Chit. jun. Cont. 115. The common form of the indenture is not *inter partes*. It begins, "This indenture witnesseth, that [*&c.*], binds himself" [*&c.*], and ends with a clause, that "for the true performance of the indenture, each party binds himself to the other," [*&c.*] This clause constitutes a covenant, and binds the parties executing the deed according and in reference to their relative positions; and if the father of the apprentice execute the deed, he is liable thereon for any misconduct of the apprentice in violation of its provisions, although it be not expressed in terms in the prior part of the instrument that the father thereby covenants with the master, &c.; Branch *v.* Ervington, 2 Dougl. 518. The common indenture often runs, that the master covenants (not stating *with whom*) to instruct the apprentice, &c.; and it seems that in such case the latter alone (if a party to the deed), should be the plaintiff in an action against the master for a breach of his covenant, although the father be also a covenanting party.]

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ally be employed affirmatively or negatively (as the case may be) in the formal statement of the breach; Lutw. 329; Lee *v.* Johnson, 3 T. R. 307; Harris *v.* Mantle, 1 C. & M. 89; Earl of Falmouth *v.* Thomas, 7 C. & P. 129; see, however, Warn *v.* Bickford, 7 Price, 550; 9 *id.* 43.

In covenant to allow a business to be carried on in a certain shop, a breach that defendant improperly shut up the shop is sufficient, without alleging that the shop was shut up at unreasonable or improper times; Hodges *v.* Gray, 4 Dowl. P. C. 733.

In covenant for nonpayment of a liquidated sum—as on a mortgage-deed for nonpayment of the sum agreed to be paid—on a lease for nonpayment of rent—or upon an annuity-deed for arrears of the annuity—if the defendant do not plead, or the plaintiff obtain judgment on demurrer, the judgment is not final in the first instance (as in debt, see *ante*, 414, note (*a*);) but there is no occasion to have a writ of inquiry to ascertain the amount due. It may be ascertained by reference to the master or prothonotary of the Court, on a rule to compute; see Ch. Arch. 4th ed. 590, 5th ed. 616. So that in these cases debt is not much more advantageous than covenant.

(*b*) In general, *debt* is the preferable form to recover the arrears or an annuity; see *ante*, 416, note (*o*). In covenant on an annuity-deed there may be a reference to the master to compute principal and interest, in case the defendant suffer judgment by default, &c. *supra* note (*a*).

## CHARTER PARTIES.

[When a charter party is under seal, the declaration should be in covenant, or it may be in debt if the action be merely for the nonpayment of †money; and the action should be founded upon the deed. See the forms in *assumpsit*, referred to *ante*, 100; Porter *v.* Izat, 1 M. & W. 381; Walter *v.* Fothergill, 7 C. & P. 392; forms in covenant, 2 Chit. Pl. 5th ed. 528, 531, 533, 6th ed. 131, 135; 3 Wentw. 341, 344, 350, 352, 355, 358, 362, 364, 372; Abb. Ship. 5th ed. *Index*, "Charter Party."

## HEIRS AND DEVISEES.

### *Declaration in Covenant against an Heir and Devisee.* (c)

—— to wit. A. B. by ——, his attorney [*or* "in his own proper person"], complains of C. D., heir of G. H. deceased, and E. F. devisee of the said G. H. of divers lands and tenements, which were of the said G. H. deceased, at the time of his death, by his last will and testament, who have been summoned to answer the said A. B. in an action of covenant. For that whereas in the lifetime of the said G. H., to wit, on [*&c.*], by a certain indenture then made between the defendant of the one part, and the said G. H. of the other part, which indenture, sealed with the seal of the said G. H. the plaintiff now brings here into Court, the said G. H. did for himself, *his heirs, (d)* executors, and administrators, covenant [*&c.*], that he the said G. H., his heirs [*&c. set out the covenant as usual*];

(c) By 11 Geo. 4 & 1 Will. 4, c. 47, (repealing the 3 & 4 Will. & Mary, c. 14, the 6 & 7 Will. 3, c. 14, the 4 Anne, c. 5 (Ireland), and the 47 Geo. 3, c. 74), all wills and testamentary limitations, dispositions, or appointments, made by persons then in being, or thereafter to be made by any person, of or concerning any manors, messuages, lands, tenements, hereditaments, or any rent, profit, term, or charge, out of the same, whereof any person at the time of his decease shall be seised in fee, in possession, reversion, or remainder, or have power to dispose of by will, shall be taken as against persons with whom the testator shall have entered into any bond, covenant, or other specialty, binding on his heirs, to be fraudulent and void.

By sec. 3, every creditor, by bond, covenant, or other specialty, may maintain any action of debt *or covenant* against *the heir and such devisees*, or the devisees of such first-mentioned devisees *jointly*; and such devisees shall be liable for a false plea in the same manner as the heir would be, or for not confessing the lands or tenements descended.

By sec. 4, if there is no heir-at-law, actions may be maintained against the devisee alone.

By ss. 6 and 8, the heir and devisee are each made answerable for debts, although they may sell the estate before action brought, to the value of the lands sold.

The former stat. 3 & 4 Will. & Mary, c. 14, did not extend to actions of *covenant*; Wilson *v.* Knubley, 7 East, 127; 3 Smith, 123, S. C. See the excellent note on this subject, and the pleadings connected therewith, 2 Saunders, by Williams, 7; and Farley *v.* Briant, 3 Ad. & E. 839, cited *infra*; pleas by heirs and devisees, &c. *post*, tit. "Heir," and notes; Covenant by heir on a lease, *post*, 474, Form 4.

(d) The *heir* is not liable, unless the covenantee *expressly* bound *his heirs*; 2 Saund. 134, note (1), 136.

and although the time so appointed for payment of the said sum of £—— and interest elapsed before the death of the said G. H., (*e*) nevertheless the said G. H. in his lifetime did not pay, nor have the defendants, nor hath either of them, since the death of the said G. H., paid to the plaintiff the said sum of £—— and interest †for the same on the day so appointed for payment thereof, or at any other time; and there is now due and owing to the plaintiff, for and on account of the said sum of £—— and interest, a large sum of money, to wit, £——, contrary to the said indenture; To the plaintiff's damage of £——, and therefore he brings his suit, &c.

## INDEMNITY.

[See Forms of declarations on covenants of indemnity, Saward *v.* Anstey, 2 Bing. 519; 10 Moore, 55; Amory *v.* Brodrick, 5 B. & Ald. 712; 1 D. & R. 361; 2 Chit. R. 329, S. C.; Fowle *v.* Welch, 1 B. & C. 29; 2 D. & R. 133, S. C.; Nash *v.* Palmer, 5 M. & Sel. 374; Carr *v.* Roberts, 5 B. & Ad. 78; 2 N. & M. 42. By assignor of lease against assignee, *post*, 478, Form 10.

## INSURANCE.

[The proper remedy on a policy of insurance, is debt or covenant when the instrument is under seal; see forms, 2 Chit. Pl. 5 ed. 536, 541; 6 ed 354 to 358; 3 Wentw. 378, 380, 386, 388, 403, 410; Andrews *v.* Ellison and others, 6 Moore, 199, 201, note; Whitehead *v.* Price, 2 C. M. & R. 447; 4 Gale, 151, S. C. The forms in *assumpsit*, *ante*, 132 to 137, will in general apply in covenant, with the necessary formal alteration suitable to the latter form of action. A general form of declaring against the two public incorporated insurance companies is provided by 6 Geo. 1, c. 18, s. 4; 11 Geo. 1, c. 30, s. 43. See Hughes on Insurance.

(*e*) It was decided in Farley *v.* Briant, 3 Ad. & E. 839, upon the former statute of 3 & 4 Will. 4, c. 14, that a devisee was not liable, unless the debt actually accrued due and was in arrear before the death of the testator: and *semble*, the same construction would be put on 11 Geo. 4 & 1 Will. 4.

## LEASES. (*f*)

### 1. *By a Lessor against his Lessee for Non-payment of Rent.* (*g*)

For that whereas heretofore, to wit, on the —— day of ——, A. D. ——,(*h*) by a certain indenture then made (*i*) between the plaintiff of the one part and the defendant of the other part, (*k*) the *counterpart* (*l*) of

(*f*) When the action is for *rent* due on a lease, executed by the lessee, either debt or covenant may be maintained by the lessor or his assignees, or representatives, against the lessee or his assignees, or representatives, *ante*, 432. There is this exception, that where the landlord has accepted rent from the assignee, and has thus recognized the assignment, he cannot sue the lessee in debt, *id.* See forms in assumpsit for rent on a demise not under seal, *ante*, 137, 8. Where a claim upon a lease is not for rent, an action thereon by the lessor or lessee, or by or against either of their personal representatives, must be in covenant.

In general a party suing upon a lease must show his *title* in the declaration. Where the lessor is the plaintiff, his title is not made the subject of any special allegation, because the lease operates as an estoppel against the lessee and his assigns, and the title is admitted. But if the action be brought by the assignee or representatives of the lessor, he must specially deduce his title on the face of the declaration, and show how it passed. See the Forms, *post*, 474 to 478. So where the action is brought by the assignee of the term demised, he must trace and set forth his title in detail. As to the mode of describing the estate and quantity of interest, and showing the derivation of the title, see Steph. 2d ed. 304 to 315; 3d ed. 305; 1 Chit. Pl. 5th ed. 396 to 401; 6th ed. 363 to 368; 2 *id.* 560 to 592, 5th ed.; and *id.* 375 to 398, 6th ed. "In deducing a title, it is the established rule, that conveyances are to be pleaded as they operate," per *Parke, B.* Price *v.* Williams, 1 M. & W. 14; Stephen, 3d ed. 311; Moore *v.* Earl of Plymouth, 5 B. & Ald. 70. Thus if a deed operate in law as a surrender, it should be pleaded as such with a *sursum reddidit*, though it purport to be a conveyance; Steph. 312; 1 Saund. 235, b. note 9.

The *venue* is *transitory* in debt or covenant on a lease by the lessor or his personal representatives against the lessee, or by the lessee against the lessor; and in covenant by the assignee of the reversion against the lessee, or by the lessee against the assignee of the reversion. But the venue is *local* in *debt* by the assignee or devisee of the lessor against the lessee; and in *debt* or *covenant* by the lessor or his personal representatives, or the assignee of the reversion against the assignee of the lessee; and in debt (in the *debet* and *detinet*) against the executor of the lessee; and in covenant by the assignee of the lessee against the lessor; 1 Saund. 241 b. c. d. note 6; 1 Chitty Pl. 5th ed. 301, 302; 6th ed. 270, 271. See as to the statement of venue and the consequences of misstating it, *ante*, 3, note (*d*). In Boyes *v.* Hewetson, 2 Bing. N. C. 575, 7 C. & P. 127, S. C., in a local action of covenant on a lease, the plaintiff laid the venue in a *wrong* county, but as the locality of the premises did not appear on the declaration and no issue was raised thereon, it was decided that the defendant was not entitled to a nonsuit; the defendant ought to have demurred. The 3 & 4 Wm. 4, c. 42, s. 22, gives a power to the court to direct local actions to be tried in any county. In Tremeere *v.* Morrison, 4 M. & Scott, 609, 1 Bing. N. C. 89, S. C. in a local action of covenant, the declaration stated the county in the margin, and charged that the defendant entered and became possessed of the premises, "to wit, in the county aforesaid," and it was held on demurrer, that this amounted to a sufficient allegation that the premises were situate in the county mentioned in the margin.

(*g*) See the preceding note as to form of action and venue, &c. Declaration for not paying taxes, Tremeere *v.* Morrison, 4 M. & Scott, 609; 1 Bing. N. C. 89.

(*h*) This is usually the date of the lease, but a mistake would not be material if the words "bearing date," &c. were omitted; Hall *v.* Cazenove, 4 East, 477. And even then a variance would be amendable at the trial.

(*i*) Declaration stated, "by indenture *purporting* to be made between [*&c.*], it was *witnessed* that" [*&c.*], held, after plea, sufficiently certain; Bagnon *v.* Batley, 8 Bing. 256; 1 M. & Scott, 339.

(*k*) State all the parties to the deed truly; see Mayelston *v.* Palmerston, 2 C. & P. 474; M. & Mal. 6; Arnold *v.* Revoult, 4 Moore, 66; 1 B. & B. 433.

(*l*) It is no variance where the profert is of "the said indenture," to give in evi-

which said indenture, [*or* if both *parts of the deeds be originals, that is, signed by all the contracting parties, say*, "*one part* of which indenture,"] sealed with the seal of the defendant, the plaintiff now brings here into court, (*m*) the plaintiff did demise and lease [*using the words of the lease* (*n*)] unto the defendant, a certain messuage or dwelling-house, lands, and premises, (*o*) situate in the county aforesaid, (*p*) to have and to hold the same unto the defendant, his executors, administrators, and assigns, from the ——day of ——, *then last past*, to the full end and term of —— years thence next ensuing, and fully to be complete and ended,* (*q*) yielding and paying therefore yearly and every year, during the said term, to the plaintiff, his heirs, or assigns, [*or* "executors, administrators, or assigns," *as the case may be*,] the clear yearly rent or sum of £——, payable quarterly, (that is to say) on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, in each and every year, by even and equal portions (*r*). And

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dence *a counterpart*; Pearse *v.* Norris, 3 B. & Ad. 396.

(*m*) As to profert, see *ante*, 33, note (*a*).

(*n*) The legal effect may be stated; Wilson *v.* Bramhall, 1 Y. & J. 2. Variance in stating power to lease, Portmore *v.* Bunn, 1 B. & C. 694.

(*o*) It is unnecessary and not usual to describe the premises fully; 1 Saund. 233, n. (2); 2 Saund. 366, n. (1). A variance would be amendable at the trial under the statutes 9 Geo. 4, c. 15; 3 & 4 Wm. 4, c. 42, s. 23. There is no variance in describing a demise of "all that farm or land and buildings," enumerating the parcels, as a demise of "a certain farm and buildings, and certain pieces of land therein mentioned;" Wilson *v.* Bramhall, 1 Y. & J. 2. A demise of one piece of land may be described as a demise of "lands;" Birch *v.* Gibbs, 6 M. & Sel. 115. A demise of a house and furniture may be described as a demise of a house only; Farewell *v.* Dickenson, 6 B. & C. 251. In Fenn *v.* Grafton, 2 Bing. N. C. 617; 3 Scott, 56, S. C. in an action on the case for injuring a house, the plaintiff declared upon his possession of a *messuage*, he being possessed only of *apartments*, parcel of the house, and the Court held that there was no material variance. "Wharf and storehouses," instead of "storehouse," held a material variance. Hoar *v.* Mill, 4 M. & Sel. 470. "Cellar beer field," instead of "Aller beer field," the name of a close, held a fatal variance. Pitt *v.* Green, 9 East, 188. So if name of a late tenant be misdescribed in declaration; Bowditch *v.* Mawley, 1 Camp. 195. Misdescription of veins of coals, &c.; Morgan *v.* Edwards, 2 Marsh. 96; 6 Taunt. 695.

(*p*) As to the statement of the local description, &c. see *ante*, 2, n. (*d*), and *supra*, n. (*f*); when the venue is transitory it need not be stated in the declaration where the premises are situate.

(*q*) Sometimes the *habendum* runs "determinable nevertheless as hereinafter mentioned," and the lease subsequently contains a clause for determining the lease by written notice at the end of 7 or 14 years. In this case add the words "determinable," &c. and set forth the close alluded to, in the declaration, and after showing the lessee's entry, if the lease has been determined by the notice, show the fact as follows: "and the plaintiff avers that afterwards and during the said term of 21 years, to wit, at the expiration of the first 7 years of the said term, that is to say, on the —— day of ——, A. D. ——, the said term was ended and determined by virtue of a certain notice in writing, given by the *defendant* to the *plaintiff*, six calendar months before the expiration of the first seven years of the said term of twenty-one years, to wit, on [*&c.*] of his the defendant's intention to quit the said premises, and desire to determine the said term at the expiration of the said first seven years of the said term of twenty-one years." But where the *habendum* is for twenty-one years absolutely, a power to determine, contained in a separate clause, not before referred to, need not to be noticed; Hill *v.* Saunders, 1 C. & P. 80; *infra*, n. (*r*).

(*r*) The reddendum should be stated in the terms of the lease. The common form is to the above effect. If there be any *exception* in the reddendum it should be stated. In Vavasour *v.* Ormrod, 6 B. & C. 430; 9 D. & R. 597, S. C. the reservation was "except as hereinafter mentioned," referring to a subsequent proviso, by which a deduction was to be made in a certain event, which had not happened. Held, a fatal variance to state the reservation as absolute. But where a lease con-

the said defendant did thereby covenant, promise, and agree to and with the plaintiff to pay or cause to be paid to the plaintiff, the said yearly rent or sum of £ ——, at and upon the said several days and times whereon the same was so reserved and made payable. By virtue of which said demise the defendant afterwards, to wit, on the said —— day of ——, A. D. ——, [*day the term began, or if it began as from a day before the date of the lease state the day of the date of the lease,*] entered into the said demised tenements, and was possessed thereof for the said term. (*s*) Nevertheless the plaintiff in fact saith, that after the making of the said indenture, and during the said term, and before the commencement of this suit, to wit, on the —— day of ——, A. D. ——, (*t*) a large sum of money. to wit, the sum of £——, (*u*) of the rent aforesaid for ["*one*"] year, ["*and* two quarters," *or* "the half of another year,"] of the said term ending on the day and year last aforesaid, (*x*) became and was due and owing from the defendant to the plaintiff, and still is in arrear and unpaid to the plaintiff, ‡ contrary to the said covenant of the defendant; To the plaintiff's damage of £ ——, (*y*) and therefore he brings his suit, &c.

## 2. *By the Lessor against the Lessee for not repairing, painting, &c. and for removing Fixtures.*

For that whereas heretofore, to wit, on [*&c.*] by a certain indenture then made between the plaintiff of the one part, and the defendant of the other part, the counterpart of which indenture, sealed with the seal of the defendant, the plaintiff now brings here into court, the plaintiff did demise [*proceed as in* Form 1, *ante*, 470, *to the asterisk:*] and the defendant did thereby covenant, promise, and agree to and with the plaintiff, that he the defendant, should and would (*z*) from time to time, and at all times during the said term thereby granted, well and sufficiently repair, amend, maintain, cleanse, glaze, pave, preserve, and keep the said messuage, tenement, or dwelling-house, and all the areas, vaults, cellars, buildings, drains, sinks, gutters, and appurtenances to the same belong-

tained a distinct *proviso* that if a certain event should happen after the execution of the lease, the rent reserved should be reduced, it was held that the covenant to pay rent might be declared on as an absolute covenant; Grogan *v.* Magan, 1 Alcock & Napier, 366 (*Irish*).

(*s*) This is an usual but unnecessary allegation; 1 Saund. 203, note (1).

(*t*) The last quarter day on which any part of the arrears claimed accrued due.

(*u*) The plaintiff may recover *less* than he charges to be due; but it is not judicious to claim in the declaration more than the exact sum due, because as to the excess, the plaintiff may be subjected to the costs of a plea thereto. Where a fractional part of a quarter's or half-year's rent is claimed, the allegation may be as in the text to the dagger, and then it may be added "except a small sum parcel of the said sum of £—, to wit, the sum of £—, which hath been paid and satisfied by the defendant to the plaintiff, contrary, &c."

(*x*) Or "and then elapsed" or last "elapsed"; see Henneker *v.* Turner, 4 B. & C. 157.

(*y*) A sum sufficient to cover all arrears, and interest, if claimed.

(*z*) Set out the covenants *verbatim* from the deed in the past tense.

ing, in, by and with all necessary reparations and amendments whatsoever (*a*); and also should and would, once in every three years during the said term, at his and their own costs and charges, paint twice over in oil color in a workmanlike manner all the outside wood-work, iron-work, and spouts about or belonging to the said messuage, tenement, or dwelling-house which had usually been or ought to be painted; and the same premises being so well and sufficiently repaired, supported, sustained, maintained, purged, paved, glazed, painted, amended, and kept in repair, and all additions and improvements that might be made or added thereto, should and would at the end or other sooner determination of the said term thereby granted, which should first happen, peaceably and quietly leave, surrender, and yield up unto the plaintiff, together also with the several fixtures, matters, and things mentioned and set forth in the schedule or inventory thereunder written, in good plight and condition, reasonable use and wear thereof and casualties by fire happening thereto in the meantime only excepted, (*b*) as by the said indenture fully appears. By †virtue of which demise the defendant then entered into the said demised premises with the appurtenances, and became and was thereof possessed, and continued so thereof possessed, from thence until the said demise ended and determined, to wit, the —— day of —— A. D. ——, [*or if the term had not expired when the writ was issued, say*, "hitherto;"] Yet the defendant did not nor would, from time to time after the making of the said indenture and during the said term thereby granted, well and sufficiently repair and amend, maintain, cleanse, glaze, pave, preserve, and keep the said messuage, tenement, or dwelling-house, nor the areas [*&c.*] and the appurtenances to the same belonging, in, by and with all necessary reparations and amendments; but on the contrary thereof, (*c*) the defendant, after the making of the said indenture and during the said term and whilst he was so possessed of the said demised premises, with the appurtenances as aforesaid, to wit, on the —— day of —— A. D. ——, [*any day after the date of the lease, and after the commencement of the demise, and about the time the non-repair began,*] and from thence for a long time, to wit, until the end of the said term [*or if the term be not ended* (*d*) *say*, "until the commencement of this suit,"] suffered and permitted the said messuage, tenement, or dwelling-house, and the areas, [*&c.*] and ap-

(*a*) If there be any qualification or proviso in the covenant that the landlord shall provide timber or materials, it must be stated, and there must be an allegation that the landlord performed such condition precedent, or offered so to do, &c; Thomas *v.* Cadwallader, Willes, R. 496; Lewis *v.* Wells, 7 C. & P. 222; Campbell *v.* Jones, 6 T. R. 571; Levy *v.* Herbert, 7 Taunt. 314; 1 Moore, 56, S. C.

(*b*) It is necessary to state any exceptions in the covenant; see Brown *v.* Knill, 5 Moore, 164; 2 B. & B. 395; Tempany *v.* Burnand, 4 Camp. 20; 1 Chit. Pl. 6th ed. 304, 308.

(*c*) In Harris *v.* Mantle, 3 T. R. 307, the declaration charged that the defendant had not used the farm in a husbandlike manner, "but on the contrary thereof had committed waste:" and it was held, that it was not sufficient for him to prove merely that defendant had used the farm in an unhusbandlike manner, but that the form of allegation bound the plaintiff to prove that defendant had committed *waste*.

(*d*) A covenant to *keep* in repair is broken by non-repair during the term, though the term be not ended; Luxmore *v.* Robson, 1 B. & Ald. 584.

purtenances to the same belonging, to be and continue, and the same were, for and during all the time last aforesaid, ruinous, prostrate, fallen down, and in great decay for want of needful and necessary maintaining, supporting, upholding, repairing, and keeping the same, (besides reasonable use and wear thereof and although no casualty happened thereto by fire; (*e*)) and the plaintiff further saith, that the defendant did not nor would, once in every three years during the said term at his own costs and charges, paint twice over in oil color in a workmanlike manner, the outside wood-work, iron-work, and spouts about or belonging to the said messuage, tenement, or dwelling-house which had usually been or ought to be painted according to the true intent and meaning of his said covenant in that behalf; and the plaintiff further in fact saith, that the defendant at the end of the said term, to wit, on the —— day of —— A. D. ——, left the said premises so out of repair and in such bad order and condition as aforesaid, (besides [*&c.*], although [*&c.*],) contrary to his covenant in that behalf; and the plaintiff in fact further saith, that the defendant did not nor would at the end and determination of the said term as aforesaid, leave, surrender, or yield up unto the plaintiff the said fixtures, matters, and things mentioned and set forth in the said schedule or inventory, being of great value, to wit £——, or any or either of them, in good plight or condition, according to the said covenant of the defendant in that behalf; but on the contrary thereof, the defendant at the end and determination of the said term neglected and refused so to do, although not prevented from so doing by the reasonable use and wear thereof during the said term, and although no casualty by fire happened to any or either of the said fixtures, [*&c.*] during the said term, [and then wrongfully pulled down and removed the same from the said premises, and converted the same to his the defendant's own use,] contrary to the said covenant of the defendant in that behalf; by reason whereof, and of the said demised premises having been so left in such bad repair, order and condition as aforesaid, the plaintiff was hindered and prevented from demising or letting the same on such advantageous terms as he otherwise might and would have done, and the said premises have been useless and unproductive for a long time, to wit, from the end of the said term hitherto; To the damage of the plaintiff of £——, and therefore he brings his suit, &c.

### 3. *By the Lessor against the Assignee of the Lessee for Non-payment of the Rent, and not Repairing.* (*f*)

For that whereas, heretofore, to wit, on [*&c. proceed as in the preceding forms to the end of the statement of the lease granted to the lessee, and cov-*

(*e*) Although there be a covenant to repair *after notice*, yet if there be a *general* covenant to repair, the action may be grounded on the latter covenant, which is independent; Doe *v.* Meux, 4 B. & C. 606; 7 D. & R. 98; Wood *v.* Day, 1 Moore, 389; 7 Taunt. 646.

(*f*) As to the liability of the assignee

*nants by him applicable to the case, and the lessee's entry*]; and the plaintiff in fact saith, that after the making of the said indenture, and during the said term thereby granted, to wit, on the —— day of —— A. D. ——, (*g*) all the estate, right, title, interest, term of years, then to come and unexpired, property, profit, claim, and demand whatsoever of the said E. F., of and in and to the said demised premises with the appurtenances, by assignment thereof then made, legally came to and vested in the defendant; (*h*) whereupon the defendant entered into and upon the said demised premises, and became possessed thereof, (*i*) and continued so possessed thereof from †thence hitherto; [*or* "from thence until the expiration of the said term," *according to the fact* (*k*)] yet the plaintiff saith that [*&c. state the breaches as in the preceding forms, taking care to show that the breach occurred after the assignment, as that* "during the said term and after the said assignment, to wit, on [*&c.*] a large sum [*&c.*] of the rent [*&c.*] for [*&c.*] became due from the defendant [*&c.*]," *or* "that during the said term, and after the said assignment, defendant did not nor would repair [*&c.*] but on the contrary thereof defendant, during the said term, and after the said assignment, to wit, on [*&c.*] suffered [*&c.*]"]

### 4. *By the Heir of the Lessor against the Lessee.* (*l*)

For that whereas one E. F., now deceased, before and at the time of the demise hereinafter mentioned, was seised in his demesne as of fee (*m*) of and in the tenements hereinafter mentioned to have been demised, and being so seised, heretofore, to wit, on [*&c. state the lease and the covenants*

of a lease, see Harrison's Woodfall, tit. *Assignees; post*, Pleas in Covenant, tit. *Lease*, Forms 3, 4, and notes. The liability is confined to breaches of covenant running with the land, committed while the party continues to be assignee; *Id.* A mortgagee who takes an assignment of the *whole* of the lessee's term, by way of security, is liable as assignee to the lessor, although he never entered or took possession; Williams *v.* Bosanquet, 3 Moore, 500; 1 B. & B. 238, S. C.

(*g*) Any day before the breaches of covenant occurred.

(*h*) As the lessor is supposed not to know precisely *how* the defendant became assignee, and that fact is more peculiarly within the defendant's knowledge, this general statement of the title and liability of the latter suffices as against him; see 1 Saund. 112 b, note (1); Steph. Pl. 3d ed. 370. It is the proper form against any party who is charged as assignee in law, as an executor, &c. of the lessee, &c. who enters. Where the defendant is assignee of *part* only of the premises, he should be declared against accordingly; see Curtis *v.* Spitty, 1 Bingh. N. C. 756, cited *post*, 487, note (*i*).

(*i*) This allegation seems not to be necessary, see *supra*, note (*f*); Turner *v.* Richardson, 7 East, 340, note (*a*).

(*k*) Where the declaration alleged that defendant continued in possession until the end of the term, and whilst he was in possession as such assignee suffered non-repair, and the proof was, that he ceased to be assignee before the end of the term: held no variance. Burnett *v.* Lynch, 5 B. & C. 589; 8 D. & R. 368.

(*l*) See 2 Saund. 45 a, 418, 305 a, note (13); Steph. 3d ed. 310; 2 Chit. Pl. 5th ed. 571 a, and notes; 6th ed. 384; 1 Har. Ind. 719, tit. *Covenant;* Jones *v.* King, 4 M. & Sel. 188.

(*m*) As to the statement of a freehold title, see Steph. 3d ed. 306, 307. In Harris *v.* Bevan, 4 Bing. 646; 1 M. & P. 633, the action was by the assignee of the reversion, and the declaration alleged that the "lessor *was seised*," without stating of what estate, and being so seised *devised*, &c. to plaintiff in fee. *After verdict*, held a sufficient allegation of title. The allegation in the text suffices, though the fee were conditional or determinable on a certain event; Doct. Pl. 287.

*broken, and the lessee's entry, as in the preceding forms;*] and the defendant being so possessed, and the said E. F. being seised of the said reversion of and in the said demised premises, he the said E. F. afterwards, and during the said term, to wit, on [*&c.*] died so seised of the said reversion of and in the said demised premises; whereupon and whereby the said reversion of and in the said demised premises then descended and came to the plaintiff as [*son*] (*n*) and heir of the said E. F. deceased; and thereby the plaintiff then became and was, and still is seised of the said reversion of and in the said tenements in his demesne as of fee; yet [*&c. assign breaches as usual, showing that they were committed,* "after the death of the said E. F."]

### 5. *By the Devisee of the Lessor against the Lessee.* (*o*)

For that whereas before and at the time [*&c. state the lessor's seisin in fee—the demise &c. and the lessee's entry, as in the* Form 4, *supra;*] and the said E. F. being so seised of the said reversion of and in the said premises, he the said E. F. heretofore, to wit, on the —— day of —— A. D. ——, duly made and published his last will and testament in writing, signed by him the said E. F., and attested and subscribed in the presence of the said E. F. by three credible witnesses, according to the form of the statute in such case made and provided; and thereby (among other things) gave and devised the said reversion of and in the said demised premises, with the appurtenances, unto the plaintiff, *to hold the same unto and to the use of the plaintiff*, his heirs and assigns for ever; and the said E. F. afterwards, to wit, on [*&c.*] died so seised of the said reversion of and in the said demised premises, without altering his said will as to the said devise; whereupon and whereby the plaintiff then became and was seised of the said reversion in his demesne as of fee; yet [*&c. assign breaches as in the preceding forms, showing that they occurred,* "after the death of the said E. F."]

### 6. *By the Assignee of the Reversion in Fee (by lease and release) against the Lessee.* (*p*)

For that whereas one G. H., at the time of the making of the indenture hereinafter mentioned, was seised in his demesne as of fee of and in the tenements hereinafter mentioned to have been demised.(*q*) And be-

(*n*) Must show how heir, &c.; Lidgbird *v.* Judd, 7 D. & R. 517.

(*o*) 2 Saund. 235; *id.* 253, 276 a, note (*a*); Steph. 3d ed. 313; 1 Har. Ind. tit. *Covenant.*

(*p*) 2 Saund. 10, 275; 2 Chit. Pl. 5th ed. 578, 6th ed. 367, 378. Statement of a conveyance by bargain and sale inrolled, 1 Saund. 251, 252, 256; 2 Saund. 275, 297, c.; 2 Chit. Pl. 5th ed. 576, 6th ed. 387. By fine levied, 2 Saund. 175, 269; 1 Saund. 258; 2 Chit. Pl. 5th ed. 580, 6th ed. 390. By recovery suffered, 2 Chit. Pl. 5th ed. 582, 6th ed. 391, 392. The assignee of the reversion of part of the premises demised may sue for not repairing; Twynam *v.* Picard, 2 B. & Al. 105.

(*q*) See *ante*, 474, note (*m*).

ing so seised, heretofore, to wit, on [*&c. state the demise and covenants, and lessee's entry, as in the* Forms 1, 2. *ante*, 468, 471, *and then proceed as follows:*] And the said E. F. being so seised of the said reversion as aforesaid, afterwards, to wit, on [*&c.*] by a certain indenture of bargain and sale then made between the said E. F., of the one part, and the plaintiff of the other part, (which said indenture, sealed with the seal of the said E. F. the plaintiff now brings here into Court, the date whereof is the day and year last aforesaid), he, the said E. F., for and in consideration of a certain sum of money, to wit, the sum of 5*s.* then therefore paid by the plaintiff to the said E. F., did bargain and sell the said [*or*, "the said reversion of and in the said"] demised tenements, with the appurtenances, to the plaintiff, to have and to hold the same to the plaintiff, his executors, administrators, and assigns, from the day next before the day of the date of the said last mentioned indenture, for the term of one whole year from thence next ensuing, and fully to be complete and ended. By virtue of which said last mentioned indenture, and by force of the statute made for transferring uses into possession, the said reversion of and in the said demised tenements, with the appurtenances, became and was vested in the plaintiff for the said term so to him thereof granted as aforesaid, the further reversion thereof, with the appurtenances belonging to the said E. F., his heirs and assigns. And the plaintiff being so interested as aforesaid, and the defendant being so possessed of the said demised premises for the residue of the said term so to him thereof granted, afterwards, to wit, on [*&c.*] by a certain indenture of release then made between the said E. F. of the one part, and the plaintiff of the other part, and which last mentioned indenture, sealed with the seal of the said E. F., the plaintiff now brings here into Court, the date whereof is the day and year last aforesaid, he, the said E. F., for and in consideration of a certain sum of money, to wit, the sum of £—— then paid to him by the plaintiff, did grant,(*r*) bargain, sell, alien, release, and confirm unto the plaintiff, and his heirs, the said demised premises, with the appurtenances, to have and to hold, [*&c. set out the habendum as in the deed.*] By virtue of which said last mentioned indenture, and by force of the statute made for transferring uses into possession, afterwards, and during the continuance of the said term by the said first mentioned indenture granted, to wit, on the day and year last aforesaid, he, the plaintiff, became and was, and from thence hitherto hath been and still is seised in his demesne as of fee of and in the said reversion of and in the said demised tenements with the appurtenances (*s*); yet [*&c. state the breaches as in the forms, ante,* 470 *and* 472, *alleging that they occurred after* "the plaintiff became seised as aforesaid."]

(*r*) See Stephen, 312, 3d ed., from which it seems that it would be more correct to plead the conveyance as a *release* only, such being its legal effect.

(*s*) Misdescription of legal effect of conveyance, Scott *v.* Godwin, B. & P. 67.

### 7. *By the Assignee of a Lessor, being a Termor, against the Lessee.*(t)

For that whereas one E. F. before and at the time of the demise hereinafter mentioned, was lawfully possessed of the tenements and premises, with the appurtenances, hereinafter mentioned to have been demised to the defendant, (that is to say,) for the residue and remainder of a certain term of years, to wit, of —— years, commencing from the —— day of ——, A. D. ——, to come, and unexpired therein, and being so possessed thereof, heretofore, to wit, on [*&c.*] by a certain indenture [*here state the lease and covenants broken, and the lessee's entry, as ante*, 468, Form 1.] And the defendant being so possessed of the said premises, and the said E. F. being possessed of and in the said reversion therein, he, the said E. F., heretofore, to wit, on [*&c.*] aforesaid by his certain deed poll, indorsed on the said indenture and duly signed by him, and sealed with his seal, and which the plaintiff now brings here into Court, the date whereof is the day and year last aforesaid, for the considerations therein mentioned, did bargain, sell, assign, transfer, and set over unto the plaintiff, his executors, administrators, and assigns, the said reversion of and in the said demised premises as by the said deed poll fully appears, whereupon and whereby the plaintiff then became and was, and from thence hitherto hath been and still is possessed of the said reversion of and in the said tenements, with the appurtenances; yet the plaintiff in fact saith that [*state the breaches as in the forms, ante*, 470 *and* 472, *showing that they occurred* "after the plaintiff became possessed of and in the said reversion as aforesaid."]

### 8. *By the Executor of the Lessor (a Termor) against the Lessee.*(u)

*Commencement as Executor, ante*, 14, Form 15:] For that whereas [*&c. state that the lessor was possessed of a term (v) as in the* Form 7, *ante*, 476, *unless the action be confined to breaches of covenant committed in the life-time of the testator: and after showing the lease and covenants, and lessee's entry, as in the* Forms 1, 2, *ante*, 468, 471, *proceed thus:*] And the defendant being so possessed of the said premises, and the said E. F. being possessed of and in the said reversion of and in the said premises, afterwards, and

(t) In general the commencement of particular estates must be shown that it is traced from the title in fee, but there is an exception, where, as in the above case, the action is mainly grounded on the lease, and the title is alleged as matter of inducement only; Stephen, 3d ed. 308, 309.

(u) See forms, Baker *v.* Gostling, 1 Bing. N. C. 18; 4 M. & Scott, 539, S. C. By the executor of the lessor against the lessee for cutting trees in the life-time of the testator, Liddard *v.* Holmes, 2 C. M. & R. 588.

(v) This is essential where the breach is after the death, because the property and right of action would pass to the heir or devisee, if the testator had a freehold estate; see Mackay *v.* Mackreth, 2 Chit. R. 461; 4 Doug. 213. When executors may sue on lease or covenant, &c. *id;* Kingdon *v.* Nottle, 1 M. & Sel. 355; see 10 Bing. 533; 2 C. M. & R. 588.

during the said term so demised to the defendant, to wit, on [*&c.*] the said E. F. duly made and published his last will and testament in writing, and thereby appointed the plaintiff executor thereof, and afterwards, to wit, on [*&c.*] the said E. F. died so possessed of the said reversion of and in the said demised premises, after whose death, to wit, on [*&c.*] the said plaintiff duly proved the said last will and testament, and took upon himself the burthen of the execution thereof, whereby the plaintiff, as executor as aforesaid, became possessed of the said reversion of and in the said tenements; yet [*&c. state breaches as usual, showing whether they occurred* "in the life-time," *or* "after the death of the said E. F." *and conclude with profert as ante*, 14, Form 15.

### 9. *By the Legatee of a Termor, who was the Lessor, against the Lessee.*

For that whereas [*&c. state that the lessor was possessed of a term, the lease and lessee's entry, as ante*, 476, Form 7:] And the defendant being so possessed of the said demised premises, with the appurtenances, and the said E. F. being so possessed of the said reversion as aforesaid, afterwards and during the said term so granted to the defendant, to wit, on the —— day of ——, A. D. ——, the said E. F. duly made and published his last will and testament in writing, and thereby gave and bequeathed the said reversion of and in the said demised premises, with the appurtenances, unto the plaintiff and his assigns, and by his said will he, the said E. F., then appointed G. H. executor thereof, and afterwards, to wit, on [*&c.*] he †the said E. F. died so possessed of the said reversion of and in the said demised premises, with the appurtenances, without revoking the said bequest. After whose death, to wit, on [*&c.*] the said G. H. duly proved the said will, and took upon himself the burthen of the execution thereof, and then assented (*x*) to the said bequest to the plaintiff, whereby the plaintiff became and was possessed of the said reversion of and in the said demised premises, with the appurtenances; yet [*&c. state breaches as usual, showing they were* "after the plaintiff became possessed of the said reversion as aforesaid."]

### 10. *Form in Covenant by a Lessee against his Assignee of the Lease for a breach of Covenant of the latter to pay the Rent to the Lessor, whereby Plaintiff was obliged to pay it.* (*y*)

For that whereas heretofore, to wit, on [*&c.*] by a certain indenture then made between E. P. of the one part, and the plaintiff of the other

(*x*) In the case of *leasehold* property, the executor's assent to the bequest is essential, and must be alleged; 1 Saund. 278, n. 5; Williams on Executors.

(*y*) See Neale *v.* Wyllie, 3 B. & C. 533. Covenant by lessee against lessor for breach of the covenant for quiet possession; Dawson *v.* Dyer, 5 B. & Ald. 584; 2 Chit. Pl. 5 ed. 559, 6 ed. 373.

'he said E. P. did demise and lease unto the plaintiff, his executors, trators, and assigns, a certain messuage and premises therein d and described, to have and to hold [*&c.*], yielding and paying *abendum and reddendum in the past tense,*] and the plaintiff did nant [*&c. set out covenant to pay rent,*] whereupon the plain- d upon the said tenements, and became and was possessed aid term, and being so possessed, afterwards and during wit, on the —— day of ——, A. D. ——, by a certain e between the plaintiff of the one part, and the defen- rt, [which said last-mentioned indenture sealed with nt, the plaintiff now brings here into Court, (*z*)] the gain, sell, assign, transfer, and set over unto the e said demised tenements, with the appurtenances, and all estate, right, title, interest, and term of years then to come and unexpired of the plaintiff, of and in and to the said tenements and every part thereof, to have and to hold the same unto the defendant from the date hereof for the residue of the said term of twenty-one years, together with the said indenture of lease and all benefit and advantage thereof, *subject nevertheless* (*a*) to the payment of the said yearly rent, and to the performance and observance of the several covenants and agreements which on the lessee's or tenant's part were and are thereby required to be performed or observed. And the defendant did thereby covenant, promise, and agree to and with the plaintiff, that he, the defendant, should and would well and truly pay [*&c. set out the covenant to pay the rent and perform the covenants, and indemnify the plaintiff,*] whereupon the defendant then entered upon the said demised tenements, and became and was possessed thereof as such assignee: yet the plaintiff saith, that after the making of the said several indentures, and after the defendant became such assignee, and during the said demised term, to wit, on the —— day of ——, A. D. ——, a large sum of money, to wit, the sum of £—— of the rent aforesaid, for [one quarter] of a year of the said term then last elapsed, became and was due and owing upon and by virtue of the said indenture of lease and the said covenant of the plaintiff to pay the same; yet the defendant did not nor would pay or cause to be paid the said sum of £——, or any part thereof, and the same was left and remained due and owing and in arrear, contrary to the plaintiff's said covenant, and thereupon, whilst the same was so in arrear, to wit, on the —— day of ——, A. D. ——, the plaintiff was called upon and forced and obliged to

(*z*) If the defendant is in possession of the deed there should be an allegation of an excuse for making profert, instead of this profert; see *ante*, 417, note (*r*).

(*a*) It has been decided that these words, "subject, &c." do not constitute a covenant; so that the action of *covenant* does not lie except upon the *express* covenant of the lessee, and *case*, in the absence of such covenant, is the proper remedy; see Wolveridge *v.* Steward, 1 C. & M. 644, in error; Burnett *v.* Lynch, 5 B. & C. 589. A re-assignment by the assignee does not destroy the assignor's right of action against him upon the covenant to indemnify; see Harley *v.* King, 2 C. M. & R. 18; 1 Gale, 100, S. C.

pay, and did then pay the said sum of £—— to the said E. P. [*or* "to a certain person, to wit, G. H. who then had lawful right and title to the said tenements, subject to the said lease, and had the estate and right of the said E. P. therein, and lawful right and title to demand and receive the said sum of £—— from the plaintiff as such lessee upon the said lease:] yet the defendant hath not repaid such sum of £——, or any part thereof, to the plaintiff, although the defendant then had notice of the premises and was requested by the plaintiff so to do, and the plaintiff is now damnified to the amount thereof, contrary to the said covenant of the defendant; To the damage of the plaintiff of £——, and therefore he brings his suit, &c.

## MORTGAGE DEEDS.

[The declaration in covenant on a mortgage-deed (*b*) will be similar to the form in debt, *ante*, 434: ending with the words, "to wit, the sum of £——," *ante*, 435; and then proceed, "contrary to the defendant's said covenant; To the plaintiff's damage of £——, [*laying a sum sufficient to cover principal and interest to the time judgment will probably be recovered,*] and therefore he brings his suit, &c."]

## PARTNERSHIP DEEDS.

### *Declaration by a Partner against his Co-partner for a Breach of the Covenant of the latter, that the Business should be conducted in their joint Names; the Defendant refusing to allow the Plaintiff's Name to be placed with his own on Goods manufactured by the Firm. (c)*

*Commencement as ante*, 1, *in covenant.*] For that whereas heretofore, to wit, on [*&c.*], a certain indenture then made between the defendant of the one part, and the plaintiff of the other, one part of which said indenture, sealed with the seal of the defendant, the plaintiff now brings here

(*b*) Where the covenant was to pay the money at a certain time and place, it was held no material variance to omit all mention of the place in setting out the covenant; Paine *v.* Emery, 1 Gale, 266; 4 Dowl. P. C. 191, S. C. Declaration stated, defendant covenanted for himself, his "heirs," &c.: the covenant did not contain the word "heirs:" held not a variance; Hamburgh *v.* Wilkie, 1 Chit. R. 518; 4 M. & Sel. 474, n.

(*c*) In general, one partner cannot sue his co-partner at law, in reference to the partnership concerns; see Chitty, jun. Contr. 2nd edit. 193. But there is an exception in the case of an express covenant between them. The above form was used in a case which came before the Court of Exchequer in Easter Term, 1836, on demurrer to the replication. The Court appeared to entertain an opinion favorable to the plaintiff, upon the general question of law, arising on the face of the declaration; but no judgment was given, as the

into Court, it was and is witnessed, that the defendant did thereby admit and accept the plaintiff to be a partner with him in the trade or business of an awl blade maker. And each of them, the defendant and plaintiff for himself, his heirs, executors, and administrators, did thereby covenant, declare, and agree with and to the other of them, his executors, administrators, and assigns, that they, the plaintiff and the defendant, had become, and under and by virtue of the said indenture should and would be and continue co-partners together in the said trade or business of awl blade makers, and in all transactions, matters and things relating thereto for the term of twenty-one years, to be computed from the date thereof, and to be thence next ensuing, if they, the said parties, should so long live, under and subject to the provisions, conditions, declarations, and agreements thereinafter contained; and it was and is thereby agreed and declared by and between the said parties thereto, that the said joint trade, and all buyings, sellings, and other transactions relative thereto, should be carried on and made for the first fourteen years of the said term of twenty-one years, under the name, style, or firm of "T. A. & Co." and for the last seven years of the said term of twenty-one years under the name, style, or firm of "A. & P." save nevertheless as thereinafter mentioned, or otherwise in the joint names of them the said parties, and for their mutual or common benefit, and at their mutual or common risks and costs; and that all contracts and engagements to be entered into by the said parties, or either of them, on account of or in any wise concerning the said co-partnership, or joint trade; and all bills for goods to be delivered, and receipts for money to be paid on account of the said partnership, or joint trade, should be in the name of the said co-partnership firm, or otherwise in the joint names of the said co-partners. Provided always, and it was and is thereby further declared and agreed, by and between the said parties thereto, that it should and might be lawful to and for the defendant at any time thereafter, during the said co-partnership, if he should be so minded and desirous to admit of any one or more of his son or sons into the said joint trade or business, when and as he or they should respectively arrive at the age of twenty-one years; and in that case, and from the time such son or sons should be so admitted or accepted a partner or partners in the said joint trade, the business of the said concern should from thenceforth be conducted and managed under the name and style, or firm, of "T. A., Son, & P.," or "T. A., Sons, & P." as the case might be, as by the said indenture fully appears. And the plaintiff avers, that by virtue of the said indenture, the plaintiff and defendant on [*&c.*], became such partners as aforesaid; and such partnership hath continued from the date of the said indenture hitherto, and is still continuing in force. (*d*) And although the plaintiff and defendant

action was referred to arbitration. The learned counsel, to whom it was referred, made an award in the plaintiff's favor. See 2 Jac: & Walker, 268; Hodges *v.* Gray, 4 Dowl. P. C. 733.

(*d*) A doubt was entertained by some of the judges whether the declaration ought not to have contained an allegation to the

as such partners, and in the way of their said trade and business, after the expiration of the first fourteen years of the said term of twenty-one years, to wit, on [*&c.*], and on divers other days and times after that day, and before the commencement of this suit, manufactured, kept, and exposed for sale, and sold divers and very many, to wit, one million of awl blades; yet the defendant disregarded the said indenture and his covenant in that behalf, in this, to wit, that he did not nor would, although requested by the plaintiff so to do, suffer or permit the said awl blades, or any or either of them, to have placed thereon the names of A. & P., or the name of P.; and then wrongfully refused to suffer or permit the name of P., either with or without the name of A., to be placed upon any or either of the said awl blades, and caused the name of A. only to be placed and retained thereon, without the plaintiff's consent, contrary to the said indenture; and by reason thereof divers persons have believed and supposed, and do believe and suppose, that the defendant only was and is the maker of the said awl blades.

## VENDORS AND PURCHASERS.

[See Forms in covenant for breaches of covenant for title and further assurance, 2 Chitty's Pl. 5th ed. 543, 546; and 358 and 360, 6th ed.; Lewis *v.* Campbell, 3 Moore, 35; Foster *v.* Pierson, 4 T. R. 617, 620; Milner *v.* Horton, M'Clel. 647; King *v.* Jones, 1 Marsh. 107; Kingdon *v.* Nottle, 1 M. & Sel. 355; Evans *v.* Vaughan, 4 B. & C. 261; 2 Saund. 175 to 183; and notes; Doe dem. Smith *v.* Pike, 3 B. & Ad. 742. By and against vendors and purchasers for not conveying or accepting a conveyance, Forms, *ante*, 176 to 186; Dobell *v.* Hutchinson, 3 Ad. & E. 355; Price *v.* Williams, 1 M. & W. 6.]

following effect, and it should therefore be inserted, "and the plaintiff further saith, that long before, and at the time of the making of the said indenture, and continually from thence hitherto, it hath been, and is usual for persons carrying on the said trade or business of awl blade makers, to place or mark on awl blades, made by them, in the way of their said trade or business, their respective names, for the purpose of designating and notifying, and they did thereby designate and notify, that they were the makers thereof."

# COVENANT—PLEAS IN.

[*Observations.*—By the new rules on pleading, "in debt on specialty or covenant, the plea of *non est factum*, *ante*, Form, 443, 444, and *notes*, shall operate as a denial of the execution of the deed in point of *fact* only, and *all other defences shall be specially pleaded*, including matters which make the deed absolutely void, as well as those which make it voidable." There is, properly speaking, no general issue in covenant: *non est factum* merely denies the execution of the deed as set out. If that be proved, the plaintiff must recover, as the plaintiff's other allegations, and the breach, are admitted. Where the defendant is party to a deed he cannot traverse its operation by pleading, "that he did not grant," &c. but must plead *non est factum*. But the rule is otherwise in the case of a stranger to the deed: Steph. 3d edit. 198; 1 Chit. Pl. 6th ed. 483; Taylor *v.* Needham, 2 Taunt. 278; 3 N. & M. 50, note. Illegality of consideration must be specially pleaded. Where the defence is that the defendant has *performed* the deed, he should traverse the non-performance alleged in the declaration. If the breach of covenant be admitted, but be justified, the matter must be specially shown. A plea that defendant did not break his covenant (*non infregit conventionem*) is bad on demurrer, though aided by verdict; Hodgson *v.* E. I. Company, 8 T. R. 278; 1 Chit. Pl. 6th edit. 487. And according to many ancient authorities, *riens en arriere* is a bad plea to a covenant for payment of rent, &c. on a particular day, *id.*; a doctrine which was recently confirmed in Baden *v.* Flight, 3 Bing. N. C. 685. See further, Tidd, N. P. 356. In covenant the defendant begins, if the affirmative *proof* on *all* the issues lies on him, although the action be for unliquidated and unascertained damages; Reeve *v.* Underhill, 1 Mo. & Rob. 440; Wooton *v.* Barton, *id.* 518; Lewis *v.* Wells, 7 C. & P. 221; Soward *v.* Leggatt, 7 C. & P. 613.]

## NON EST FACTUM.

[See the form of plea, *ante*, 443, 444, Forms, 4, 5, and the *notes* thereon, *id.* The form of the plea in covenant is similar to that in debt.]

## †ACCORD AND SATISFACTION.

[See observations, *ante*, 444; Pl. Assistant, 334; *post*, tit. "Payment," Form 2.]

## ANNUITY DEED.

[See the pleas in *debt* on an *annuity deed*, which equally apply in covenant, *ante*, 445 to 447; *post*, tit. "Payment," 489.]

## APPRENTICES.

[See pleas, 3 Chit. Pl. 5th edit. 1003; 6th edit. 897; and cases, &c. cited, *ante*, 466.]

## BANKRUPT.

[The pleas in *assumpsit* of defendant's bankruptcy and certificate, &c. *ante*, 247 to 253, may readily be adapted to the necessary forms in covenant for non-payment of money—stating that, "after the making of the said indenture," &c.]

## CHARTER PARTY.

[See *ante*, 446, and authorities there cited. In general, pleas to declarations on charter parties are mere traverses of allegations in the declaration of matter constituting a condition precedent to the defendant's liability, or denials of the breaches, concluding to the country.]

## DE INJURIA, REPLICATION.

[Upon the principle of the recent cases, which have established that the general replication *de injuriâ*, may be adopted in *assumpsit*, in answer

to a special plea in confession and avoidance, showing matter *in excuse* for the defendant's breach of promise, (see Index, title *De Injuriâ*,) it seems that this general form of replication might also be used in covenant, where a plea of that kind is pleaded. The form would be as in assumpsit, stating that †defendant of his own wrong and without the cause, &c. "broke his said covenant" *modo, &c.*]

## EXECUTORS.

[See *Pleas in Assumpsit, ante*, 294, which in general apply *in covenant* also. Pleas by executors sued on a lease, *post*, 487, note (*i*).]

## HEIRS AND DEVISEES.

### 1. *Plea by an Heir, sued on the Covenant of his Ancestor of riens per Descent.* (*a*)

And the defendant, by —— his attorney, saith that he had not, at the time of the commencement of this suit, nor hath he had at any time before or since, any lands, tenements, or hereditaments, by descent from his said father [or "*brother*," *&c.*] in fee simple, and this he is ready to verify, &c.

(*a*) See declaration, &c. *ante*, 467. By 11 Geo. 4 and 1 Wm. 4, c. 47, s. 7, where any action of debt or covenant upon any specialty is brought against the heir, he may plead riens per descent at the time of action brought; and the plaintiff may reply that he had lands, &c. from his ancestor; (*see form of replication, supra,*) and if upon issue joined thereupon it be found for the plaintiff, the jury shall inquire of the value of the lands, &c. so descended, and thereupon judgment shall be given and execution awarded; but if judgment shall be given against such heir by confession, without confessing the assets descended, or upon demurrer or *nil dicit*, it shall be for the debt and damages, without any writ to inquire of the lands, &c. so descended. See forms on the old statute (3 & 4 Will. & Mary, c. 14,) 7 Wentw. 603; 3 Chit. Pl. 5th edit. 973, 6th edit. 860; Gott *v.* Atkinson, Willes R. 521; 2 Brown, 613; 7 Ves. 322; 2 Atk. 290; Briant *v.* Farley, 3 Ad. & E. 839. See the law on this subject, 2 Saund. 7, n. 4; Com. Dig. Pleader, 2 E. 3; Bac. Abr. Heir, F. The defendant may of course plead that he is not heir, &c. A plea by an heir that he claimed to lay out a sum of money in repairing premises, would be bad; Shetleworth *v.* Nevile, 1 T. R. 454. If the jury do not inquire of the value of the lands descended, on finding that there are such lands *a venire de novo* will be awarded; Brown *v.* Shaker, 1 Tyr. 400; 1 C. & J. 583; 1 Price's P. C. 1. The jury cannot give a larger sum than the value of the lands descended, at least if they do, execution cannot be levied to a greater amount; Brown *v.* Shaker, 2 Tyr. 320; 2 C. & J. 311. Of course the heir may in addition to the above plea of no assets, deny the deed, or show that the covenant has been performed, or justify the non-performance as the ancestor might have done; but this should, on account of costs, be avoided, unless there be good ground for such a line of defence. Plea of payment of another specialty debt, 1 Stra. 605.

### 2. *Replication thereto.*

And the plaintiff saith, that the defendant, at the time of the commencement of this suit, had, and now hath, divers lands, tenements, and hereditaments, by descent from his said father in fee simple, of great value, to wit, to the amount of the damages by the plaintiff sustained by reason of the said breaches of covenant, and wherewith the defendant might have satisfied such damages; and this the plaintiff prays may be inquired of by the country, &c.

### †3. *Plea by a Devisee sued on the Covenant of his Testator, riens per devise.* (*b*)

And the defendant, by —— his attorney, saith that he had not at the time of the commencement of this suit, nor hath he had at any time before or since, any lands, tenements, or hereditaments, by devise from the said E. F., deceased; and this the defendant is ready to verify, &c.

## INSURANCE.

[The pleas in *assumpsit*, *ante*, 323 to 334, may be readily adapted to pleas in covenant on a policy of insurance. And see Forms, 3 Chit. Pl. 5th ed. 1009 to 1018—6th ed. 900 to 907.]

## LEASES. (*c*)

### 1. *That Defendant paid the Rent* (*d*) *when due.* (*e*)

And the defendant, by —— his attorney, [*if there be another breach, say* "as to the said supposed breach of covenant *first* above assigned,"] saith

(*b*) See Forms, &c. Farley *v.* Briant, 3 Ad. & E. 839, and *ante*, 485, note (*a*); 3 Chit. Pl. 6th edit. 860, 5th edit. 974. Special plea, Gott *v.* Atkinson, Willes R. 521. Plea, that the debt due did not accrue due until after the testator's death, Farley *v.* Briant.

(*c*) See the plea of *non est factum*, *ante*, 443, and notes, which must be pleaded if defendant deny the execution of the lease as stated in the declaration. As to pleas denying the title of the lessor, see 1 Chit. Pl. 6th ed. 487, 3 *id.* 907, 908, and note (*p*); Steph. 3d ed. 309. Plea in debt at the suit of a surviving lessor, that he and the deceased lessor were tenants in common, Burne *v.* Cambridge, 1 M. & Rob. 539. Plea in covenant by a *reversioner* that the lessor did not execute the lease; Cardwell *v.* Lucas, 2 M. & W. 111; Barnard *v.* Duthy, 5 Taunt. 27, and plea of eviction before breach; Hodgkin *v* Queenborough, Willes' R. 631; Bull. N. P. 167; see plea of *surrender*, Simons *v.* Farren, 1 Bing. N. C. 126; 4 M. & Scott, 672, S. C.

(*d*) *Riens in arriere* is a bad plea; Baden *v.* Flight, 3 Bing. N. C. 685.

(*e*) If the payment were *after* the day, the plea should be as *post*, 489, Form 2. Pleas of acceptance of *part* for the whole rent held bad; Denton *v.* Richardson, 1 C. & M. 734.

that he did well and truly pay to the plaintiff the said rent in the said declaration alleged to have become due, and to be in arrear, on the several days and times [*or* "on the day," *as the case may be*] in the said indenture mentioned and appointed for payment thereof, in pursuance of the said indenture; and of this the defendant puts himself upon the country, &c.

## 2. *That the Defendant did repair.* (*f*)

And as to the said supposed breach of covenant in the said declaration †*secondly* above assigned, the defendant saith that (*g*) he did from time to time, and at all times after the making of the said indenture, and during the said term thereby granted, when, where, and as often as use and occasion required, well and sufficiently repair, uphold, support, sustain, maintain, tile, glaze, pave, paint, cleanse, empty, amend, and keep the said messuage or tenement and premises, and all glass windows [*&c. as in the covenant and declaration*] thereunto belonging, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, and the said messuage [*&c.*] with the glass windows [*&c.*] being so well and sufficiently repaired [*&c.*] and kept as aforesaid, did, at the expiration of the said term, peaceably and quietly leave, surrender and yield up unto the plaintiff, together with all doors [*&c. as in the covenant and declaration*] according to the said indenture; and of this the defendant puts himself upon the country, &c.

(*f*) Plea that plaintiff would not provide materials according to the lease, see Lewis *v.* Wells, 7 C. & P. 222; Thomas *v.* Cadwallader, Willes' R. 496. In an action of covenant the breach was, that defendant did not repair, but suffered the premises to be ruinous, &c. Plea that the defendant did repair, and did not suffer the premises to become ruinous; held, that on this issue plaintiff must begin at the trial; Soward *v.* Leggatt, 7 C. & P. 613, cor. Lord *Abinger*, C. B.; Lewis *v.* Wells, *id.* 221. There should be a plea of payment of money into Court, if any non repair can probably be established by the plaintiff, see Form, &c. *post*, 489, "Payment." Construction of covenant to repair, see Woodf. by Har. 2d ed.; Evidence, Rosc. 4th ed. 397. A covenant to keep and leave a house in good and tenantable repair, fire and tempest excepted, is satisfied by keeping it in substantial repair according to the nature of the building; and with a view to determine the relative sufficiency of the repair, the jury may inquire whether the house were new or old at the time of the demise, Stanley *v.* Towgood, 3 Bing. N. C. 4; 3 Scott, 313, S. C. "In all these cases the question is, whether the premises have been kept in substantial repair as opposed to claims for fancied injuries, such as a mere crack in a pane of glass or the like," per *Tindal*, C. J. *id.*; Harris *v.* Jones, 1 M. & Rob. 173. A covenant to repair old premises does not extend to dilapidations necessarily resulting from the natural operation of time and the elements; Gutteridge *v.* Munyard, 1 M. & Rob. 334. A covenant to repair does not create a liability for the extra expense of laying a new floor or the like; Soward *v.* Leggatt, 7 C. & P. 613.

(*g*) It is usual to deny the breach in the words of the covenant; or the plea might be that the defendant did not suffer or permit the premises to be out of repair, &c., negativing the allegation in the declaration to that effect. Whichever form is used, the plaintiff must prove the non-repair, see note (*f*) *supra*; see the words of the covenant to repair.

### 3. *Plea by Defendant, charged as Assignee of a Lease, denying the Assignment.* (*i*)

And the defendant, by —— his attorney, says that *all* the estate, right, title, interest, and term of years then to come and unexpired, property, †claim and demand whatsoever of the said E. F., of and in the said premises, with the appurtenances, by assignment thereof duly made, did not come to or vest in the defendant in manner and form as the plaintiff hath above alleged; and of this the defendant puts himself upon the country, &c.

### 4. *Plea by Defendant, charged as Assignee of a Lease, that he assigned his interest over before Breach.* (*k*)

And the defendant, by —— his attorney, says, that after the said assignment to him the defendant, and before the committing of the said breaches of covenant or either of them, or any part thereof, to wit, on [*&c. exact day not material*] by a certain deed poll then made by the de-

(*i*) See *ante*, 473, note (*f*). The above plea is proper where the defendant had no interest in the premises, or was only under lessee or under tenant, and not *assignee* of the whole term. Evidence that the defendant has paid the rent to the plaintiff, or is in possession of the whole of the premises, is *presumptive* evidence that the term has vested in the defendant, as assignee; Peake Ev. 284, 5th ed.; 2 Phil. Ev. 125; 2 Stark. Ev. 2d ed. 42; Rosc. 4th ed. 394; Doe *v.* Williams, 6 B. & C. 41. But the usual course is to show the assignment by proving the deed, giving defendant notice to produce the deed of assignment. If the plaintiff declare that the *whole*, but can prove only that a *part*, and not the *whole*, of the term and estate demised came to the defendant by assignment, the issue on this plea must be found for the defendant; Curtis *v.* Spitty, 1 Bing. N. C. 756; 1 Scott, 737; 1 Hodg. 153, S. C.; Merceron *v.* Dowson, 5 B. & C. 479; 8 D. & R. 264, S. C. Where the defendant became assignee, but *re-assigned* before breach, he should plead performance whilst he was assignee, if the declaration charge breaches of covenant during that period, see Form 2, *supra*, 486; and, secondly, re-assignment before breach, see *post*, 488, Form 3. As to the liability of an executor or administrator of the lessee, sued as assignee of the term, see Rubery *v.* Stevens, 1 N. & M. 182; 4 B. & Ad. 241, S. C. and see form of plea there; Tremeere *v.* Morrison, 4 M. & Scott, 603; 1 Bing. N. C. 89, S. C. As to the liability of the *assignees of a bankrupt* lessee, as assignees of the term, see Turner *v.* Richardson, 7 East, 335; Copeland *v.* Stephens, 1 B. & Ald. 593; Hanson *v.* Stevenson, *id.* 303; Wheeler *v.* Bramah, 3 Camp. 340; Welsh *v.* Myers, 4 *id.* 368; 6 Geo. 4, c. 16, s. 75; Rosc. Ev. 4 ed. 395. In Thompson *v.* Bradbury, 1 Bing. N. C. 326; 3 Dowl. P. C. 347; assignees of a bankrupt, sued on a lease for rent, were allowed to plead on a summons for that purpose, first, that the lessee's interest did not pass to them, and secondly, that they abandoned and renounced such interest. As to the liability of the *bankrupt* after bankruptcy, see 6 Geo. 4, c. 16, s. 75. Plea by a bankrupt that the assignees declined the lease, and that defendant gave it up to the plaintiff, as landlord; see Tuck *v.* Fyson, 6 Bing. 321; Hope *v.* Booth, 1 B. & Ad. 505. That the assignees accepted the lease, see Chit. Pl. 6 ed. 909; 5th ed. 1019, *a*.

(*k*) See *supra*, 487, note (*i*). See a form, Harley *v.* King, 1 Gale, 100; 2 C. M. & R. 18. That this is a defence, although the assignee covenanted not to assign, and the assignment be to a pauper for the express purpose of obviating future liability, see Taylor *v.* Shum, 1 B. & P. 21; Paul *v.* Nurse, 2 M. & R. 525; 8 B. & C. 486, S. C. But the re-assignment does not discharge the assignee from liability to the lessor, or the assignee of the reversion, for breaches committed whilst the interest of the assignee, as such, existed, Harley *v.* King, *supra*. A re-assignment was held to be complete and to protect the assignee, who had executed it, although the deed remained in the hands of his solicitor under a claim of lien for preparing it; Odell *v.* Wake, 3 Camp. 394.

fendant, and sealed with his seal, [*or* "by a certain indenture then made between" *&c.* "and sealed" *&c.*] he, the defendant, did grant, bargain, sell, and assign over, transfer and set unto one E. F. the said demised premises, and every part thereof, to have and to hold the same unto the said E. F., his executors, administrators, and assigns, from thenceforth, for and during the residue and remainder of the said term so granted as aforesaid, then to come and unexpired, subject [*&c. as in the deed*] whereupon, and by virtue whereof, the said E. F. then entered into and upon the said demised premises, and became and was possessed thereof for the residue and remainder of the said term so demised as aforesaid; (*l*) and this the defendant is ready to verify, &c.

## LIMITATIONS, PLEA OF THE STATUTE OF. (*m*)

### MORTGAGE

[If the defendant deny his execution of the deed, or the sufficiency of the stamp, he should plead non est factum, as *ante*, 443, 4; see *id.* notes (*d*), (*e*). If he paid the money on the day, the plea will be as *infra*, Form 1; if after the day, as *infra*, Form 2. If there be a small balance due, it should be paid into Court, upon a plea of payment into Court *pro tanto*, as *ante*, 370. Any defence in confession and avoidance must be pleaded specially.

### NON EST FACTUM.

(*Ante*, 443, 444, and notes.)

(*l*) Notice to the landlord of the assignment need not be alleged or proved; Pitcher *v.* Tovey, 1 Salk. 81; Taylor *v.* Shum, 1 B. & P. 21.

(*m*) Before the passing of the act 3 & 4 Will. 4, c. 42, there was no statute of limitations applicable to claims on *specialties* or contracts *under seal;* but after twenty years even such claims were (and still are) by the common law *presumed* to be satisfied (under the plea of payment or satisfaction, &c. as the case may be,) unless circumstances rebutting the inference could be proved by the covenantee or obligee; see the cases, Tidd, 9th ed. 18. By that statute (section 3) actions on specialties are (with certain exceptions) to be brought within ten years after the end of the session of parliament in which the statute was passed (1833), *or* within twenty years after the cause of such actions, but not after; and this period of limitation applies to covenant for arrears of rent due on a lease, notwithstanding 3 & 4 Will. 4, c. 27, s. 42; Paget *v.* Foley, 2 Bing. N. S. 679. As some years must therefore elapse before a plea under the above act will be applicable in covenant, it has not been thought necessary to insert any form. See Form in *assumpsit*, *ante*, 345, and Petersd. 275.

## PAYMENT. (n)

### 1. *Plea of Payment on the Day according to the Covenant.* (o)

The defendant, by ——, his attorney, saith, that he did on the said —— day of ——, A. D. ——, in the said *indenture* mentioned, well and truly pay to the plaintiff the said sum of £—— therein mentioned, together *with interest thereon* (p) according to and in pursuance of his the defendant's said covenant; and of this the defendant puts himself upon the country, &c.

### 2. *Plea of Payment after the Day, in satisfaction of the Covenant.* (q)

And the defendant, by ——, his attorney, saith, that after the committing of the said breaches of covenant, and before the commencement of this suit, to wit, on [*&c.*], he the defendant paid to the plaintiff a large sum, to wit, £——, in full satisfaction and discharge of the said breaches of covenant, and of all the damages by the plaintiff sustained by reason of the committing †thereof, which said sum of £—— the plaintiff then accepted and received of and from the defendant in full satisfaction and discharge of such damages; and this the defendant is ready to verify, &c.

### 3. *Plea in Covenant, of Payment of Money into Court.*

[See the Forms 8 and 9, *ante*, 368, 370, in *assumpsit*, which equally apply in *covenant*; see notes *id.* Although several breaches of covenant are assigned, upon all or several of which money is paid into Court, the defendant may plead payment into Court of one entire sum, in satisfac-

(n) In *debt* (on *bond*), payment *post diem* is given by 4 & 5 Anne, c. 16, s. 12, *ante*, 422, note (*h*), 450. But it is not a good plea in *covenant*, except as a plea of *accord and satisfaction*; see Form 2, *infra*.

*Ricns in arrere* is a demurrable plea in covenant; see *ante*, 483.

(o) The plea will be demurrable if the traverse be more extensive than the claim, as if the plea be payment of principal *and interest*, and no interest be claimed in the declaration; *ante*, 37, note (*z*); 3 Dowl. P. C. 735, S. C.

(p) Omit "and interest," if none be reserved by the covenant, otherwise the plea will be demurrable; see note (*o*); see Drake *v.* Mitchell, 2 East, 252; Pl. Ass. 334.

Where the defence of payment applies to part only of the demand, the plea should be confined to that part with an *actio non* and prayer of judgment; see *ante*, 364, Form 2. It has been held, that in *assumpsit* partial payments on account may be given in evidence in reduction of damages, without a plea of payment; (see Shirley *v.* Jacobs, 2 Bing. N. C. 88; Scott, 157, S. C.; 1 Hodge, 214, S. C.; Lediard *v.* Bouchor, 7 C. & P. 1; *sed qu.*; *et vide* Richardson *v.* Robertson, 1 M. & W. 463); and probably the same rule (if good) would hold in covenant, wherein damages are claimed. But in *debt*, where there is no inquiry of damages, it is necessary to plead a part payment, in order to obtain the benefit thereof; Belbin *v.* Butt, 2 M. & W. 422.

(q) See *supra*, note (n).

tion of all or several of the counts or breaches, and need not distinguish how much is applied to each breach; Marshall *v.* Whiteside, 1 M. & W. 188; Jourdain *v.* Johnson, 2 C. M. & R. 564; 1 Gale, 312. Where the money is paid into Court upon part only of the declaration, the plea begins, "And as to the said breach of covenant *first* above assigned," or "as to the said breach of covenant in this, to wit, that [*&c. stating the part admitted*] the defendant saith" [*&c.*]; and the plea should state that the plaintiff has not sustained damages to a greater amount than [*&c.*] in respect of the causes of action, "as to the breach of covenant in the introductory part of this plea mentioned," &c. Money may be paid into Court in covenant either for non-payment of money, or for not performing any act [*&c.*], in respect of which general damages are claimad; see 3 & 4 Will. 4, c. 42, s. 21, *ante*, 369, note (*z*). But where the covenant is for a different act than for the payment of money, a summons for leave to pay money into Court is necessary, even though there be no other plea than that of payment into Court. *Id.*]

PERFORMANCE. (*r*)

And the defendant, by ——, his attorney, as to the said supposed breach of covenant *first* above assigned, saith, that he did [*&c. here show performance in the words of the covenant*], in pursuance of the said covenant of him the defendant; and of this the defendant puts himself upon the country, &c.

RELEASE.

[See Form, *ante*, 374, which will apply in covenant, except that it should be stated, that "after the making of the said indenture, and committing the said breaches of covenant," and before, &c.]

†SET-OFF.

[A plea of set-off cannot be pleaded in covenant, unless the breach assigned is the non-payment of money by the defendant to the plaintiff. The

(*r*) *Non infregit conventionem* is a bad plea on demurrer; and *riens en arrere* cannot be pleaded in covenant; *ante*, 483. As to pleas of performance by *payment*, see *ante*, 489. Pleas in excuse of performance, or in confession and avoidance, must be special, concluding with a verification; see Pleas in Actions on Leases, *ante*, tit. "Leases."

form is similar to that in *assumpsit*, *ante*, 387, except that it should be alleged that the debt to the defendant "exceeds the damages sustained by the plaintiff by reason of the said *breaches of covenant in the declaration assigned*, and all damages sustained by the plaintiff by reason of the committing thereof."]

## TENDER.

[In the case of a covenant to pay money on a particular day, it seems that a tender *after* the day cannot be sustained; see Poole *v.* Turnbridge, 2 M. & W. 223; *per* Parke, B. *id.* 225, 226; *sed vide* Johnson *v.* Clay, 7 Taunt. 486; 1 Moor, 200, S. C; Tidd, N. P. 357; 3 Chit. Pl. 6th ed. 909. See forms in *assumpsit*, *ante*, 396, 398.]

# DETINUE—DECLARATIONS IN. (*a*)

## 1. *Common Form of Declaration in Detinue.*

*Commencement as ante*, 1, 2, Form 1. *The venue is transitory.*] For that whereas the plaintiff heretofore, to wit, on the —— day of ——, A. D. ——, [*any day before writ issued,*] delivered to the defendant certain goods and chattels, [*or* "deeds and writings,"] to wit, ——, (*b*) of the said plaintiff, of great value, to wit, of the value of £——, (*c*) to be redelivered by the defendant to the plaintiff when the defendant should be thereunto requested. (*d*) Yet the defendant, although afterwards, to wit, on the day and year aforesaid, requested by the plaintiff so to do, hath

(*a*) In this form of action the plaintiff claims the *specific* recovery of goods and chattels, or deeds, or writings, *detained* from him by the defendant, with damages for the detention. Form, Step. 3d ed. 38; 2 Chit. Pl. 6th ed. 399; Special Form, Atkinson *v.* Baker, 4 Taunt. R. 229. See 3 Bla. C. 146, 152; Co. Lit. 296 b; 1 Chit. Pl. 5th ed. 137, 6th ed. 121; Step. 3d ed. 16; 2 Stark. Ev. tit. "Detinue," 280; Selw. N. P. tit. "Detinue." This action lies for a wrongful *detention*, whether the taking were in the first instance lawful or wrongful. *Id.* In *trover*, damages (only) for a *conversion* are claimed and recoverable, and the goods themselves cannot be obtained: in *detinue* the plaintiff claims and is entitled, if he establish his case, to recover the goods *in specie*, if they can be had. The judgment is, in effect, that he recover the goods if they can be obtained from the defendant by the sheriff, and a certain sum assessed by the jury for damages for the detention; and if the goods cannot be had, then a certain sum assessed by the jury as their value, besides the damages for detention, with costs. Therefore, in case the plaintiff is anxious to get possession of the identical goods or deeds claimed, detinue is a better form of action than trover. The jury must assess the value of each of the goods, &c. separately, because some of them may be forth-coming, others not, when execution issues; and if the jury omit to do this, the error cannot be corrected by a writ of inquiry; Pawly *v.* Holly, 2 Bla. R. 854; Anderson *v.* Passman, 7 C. & P. 193, Coleridge, J. In detinue for several things, the Court would not on motion assess the damages as to one article, and strike it out of the declaration on its being delivered up to the plaintiff; Phillips *v.* Hayward, 1 H. & W. 108; 3 Dowl. P. C. 362, S. C. Detinue, instead of trover, is the usual form of action, where the plaintiff has, in addition, a money claim against the defendant, which can be made the subject of an action of *debt*; because a demand in debt and another in detinue may be joined in one action, and thus in the same declaration the two claims can be united; see Form 2.

(*b*) The goods, &c. are usually described as in trover; see *post*, "Trover." It is said more certainty is required in the description of the goods in detinue than in trover; 2 Saund. 74 b; Co. Lit. 286 b. The date of a deed need not be mentioned; Alcorn *v.* Westbrook, 1 Wils. 116.

(*c*) A sum amply sufficient to cover the highest possible value. Although several articles be claimed, the value of the whole may be stated in the above form; Pawly *v.* Holly, 2 Bla. R. 853. But the jury must assess the value of each separately; *supra*, note (*a*).

(*d*) Sometimes a fictitious loss and finding are laid as in trover; see 2 Chit. Pl. 6th ed. 399. The above form suffices, though there were a special bailment; 2 Stark. Ev. 2d ed. 280, note (*g*). The supposed delivery or bailment to the defendant cannot be traversed by plea; see Gledstane *v.* Hewitt, 1 C. & J. 565; 1 Tyr. 445; 1 Price, P. C. 71; Walker *v.* Jones, 2 C. & M. 672; 4 Tyr. 915, S. C.

not as yet delivered the said goods and chattels, or either of them, or any part thereof, to the plaintiff, but the defendant hath wholly neglected and refused so to do, and hath detained, and still unjustly *detains*, the same from the plaintiff; To the damage †of the plaintiff of £——, [*lay a sum equal to the full value of the goods, and all damages for detention,*] and therefore he brings his suit, &c.

## 2. *Declaration in Debt and Detinue.* (*e*)

*Commencement as pointed out, ante*, 1, 2, Form 1.] For that whereas the defendant, on [*&c.*], was indebted [*&c. here proceed with the count or counts in debt, as usual, to the end, omitting the words* "to the damage," *&c. and then proceed thus:*] And whereas, also, [*adding the count in detinue and concluding* "to the damage," *&c. as supra.*]

(*e*) See *supra*, note (*a*); 2 Saund. 117 b.

[†493]

# DETINUE—PLEAS, &c. IN.

## 1. *Plea of Non-detinet.* (*a*)

The defendant, by ——, his attorney, saith, that he doth not detain the said goods and chattels [*or* "deeds and writings," *as the case may be,*] or either of them, or any part thereof, in manner and form as the plaintiff hath above complained against him; and of this the defendant puts himself upon the country, &c.

## 2. *Denial that the Goods are the Plaintiff's Goods.* (*b*)

The defendant, by ——, his attorney, saith, that the said goods and chattels, [*or* "deeds and writings,"] in the declaration mentioned, were not, nor are they, nor was, nor is either of them, or any part thereof, the goods and chattels of the plaintiff, [*if the plaintiff declare as assignee of a bankrupt, or as executor, &c. add* "as assignee," *or* "as executor," *&c. as aforesaid; if the declaration be,* "was possessed as of his own property," *traverse accordingly;*] as in the said declaration alleged, and of this the defendant puts himself upon the country, &c.

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(*a*) Com. Dig. Pleader, 2 & 3; 7 Wentw. 637, 647; proof thereon, 1 Chit. Pl. 6th ed. 122, 123; 2 Stark. Ev. tit. "Detinue." Plaintiff must prove the goods were in the possession of the defendant or his agent for him; *id.*; Anderson *v.* Passman, 7 C. & P. 193. By the new rules on pleading, "the plea of non-detinet shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea." A *lien* must be pleaded specially in *detinue*. This was considered necessary even before the new Rules; See Phillips *v.* Robinson, 4 Bing. 106, 112; 1 Chit. Pl. 6th ed. 488. A claim of lien admits a *detention* in fact, but it has been doubted whether it admits a *conversion*; see "Trover, Pleas in." We have seen that the supposed *finding* by, or *bailment* or *delivery* to, the defendant, cannot be traversed by plea; see *ante*, 492, note (*d*). The pleas in trover in general apply in detinue, which is a form of action not very frequently used.

(*b*) See *supra*, note (*a*). See the notes on the form of plea in *Trover*, traversing the plaintiff's property in the goods, which equally apply to the above form in detinue. What property the plaintiff must have to maintain detinue, 1 Chit. Pl. 6th ed. 122. He must show a right to have the goods delivered to him; Land *v.* North, 4 Dougl. 266.

The legal owner of an estate is in general entitled to, and the party to sue for, the detention of the title deeds; see Phillips *v.* Robinson, 4 Bing. 106; 12 Moor, 308; Lightfoot *v.* Keane, 1 M. & W. 745.

### 3. *Special Plea justifying the Detention, on the ground that Defendant has a Lien, &c.*

[In *detinue* a lien or other defence in confession and avoidance must be pleaded specially; *infra*, note (*a*). See the forms in *Trover*, under the head of "Lien," &c. The form in *detinue* is similar, except that the plea in *detinue* concludes, after showing the matter of justification: "Wherefore the defendant hath *detained*, and still doth *detain*, the said goods and chattels, as he lawfully might and may for the cause aforesaid, being the *detention* in the declaration mentioned; and this" [*&c.*] Pleas of lien on title deeds, Lightfoot *v.* Keane, 1 M. & W. 745. Plea that a note was deposited as a security upon a loan, Gledstane *v.* Hewitt, 1 C. & J. 565; 1 Tyr. 445, S. C. The plea may show, and justify by virtue of, a *bailment* different from that laid in the declaration, *id.* Tidd, N. P. 364, 365. [†495]

# CASE—DECLARATIONS IN. (a)

## AGENTS.

[We have seen that Case may be maintained in various cases of injuries resulting from the breach of an implied contract, where the act

(a) As to the origin, history and applicability of this form of action, see 3 Bla. C. 51; 3 Wood. V. L. 168: 3 Reeves, 89, 243, 391; 4th ed. 430; Steph. 3d ed. 7, 17; 1 Chit. Pl. 5th ed. 107, 151 to 166; 6th ed. 132 to 145; Selw. N. P. tit. "Consequential Damages." An action on the case is the proper form of remedy to recover *damages* for certain *wrongs* or *torts* committed in reference either, 1st, to the *person;* 2d, the *relative rights;* 3d, the goods or *personal* property; or 4th, the *real property*, of individuals. It is ranked amongst actions *ex delicto*.

1st. For direct or *immediate* injuries to the *person*, accompanied by *force*, committed by the defendant; as for an assault and false imprisonment, trespass is in general the remedy; but where the injury is *consequential* and not direct, as if it arise from the defendant improperly *leaving* a carriage in a highway, or from his keeping a mischievous animal, case is the remedy. Where an injury to the person, as an assault and imprisonment, &c. occurs under process of law, instigated by the defendant, case is the necessary form of action for the malice and want or probable cause, which constitute the gravamen or injury, see *post*, "Malicious Prosecutions." Injuries to the *health* by the neglect of medical men, or from nuisances, &c. or to the reputation by scandal, cannot be said to be committed with *force*, and are in their nature the *consequential* rather than the immediate result of the wrongful act, and are therefore the subject of an action on the case, and not trespass.

2d. For injuries to the *relative* rights of persons, as the rights and interests of husbands and masters in regard to their wives and servants, as crim. con., seduction of servants, &c. case is the usual remedy, but trespass also lies in general; see *post*, "Husband and Wife," "Master and Servant."

3d. In reference to wrongs committed to *personal* property, it is material to consider the nature of the plaintiff's interest or property in the goods or personalty affected. If he have only a *reversionary* interest, he must sue in case, and neither trover nor trespass can be sustained. But where the plaintiff was entitled to the immediate possession of the goods at the time of the injury thereto, he may, in general, sue in case or trover; though trespass also lies at the option of the plaintiff where the tort was direct and accompanied by force, and the plaintiff was, in fact, or law, in possession of the goods. *Case* is in some instances a concurrent remedy with *assumpsit* to recover damages resulting from a *breach of contract*, 1 Chit. Pl. 5th ed. 153, &c. 6th ed. 135; as against attorneys, agents or bailees, or carriers, &c. for negligence or unskilfulness under a retainer, or bankers who refuse improperly to pay a customer's check, (Marzetti *v.* Williams, 1 B. & Ad. 415).

"Where there is an express promise and a legal obligation results from it, then the plaintiff's cause of action is most accurately described in assumpsit, in which the promise is stated as the gist of the action. But where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation and a consequential damage, there, although *assumpsit* may be maintainable upon a promise implied by law, still an action on the case founded in tort is the more proper form of action, in which the plaintiff, in his declaration, states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach; per Littledale, J., Burnett *v.* Lynch, 5 B. & C. 609; 8 D. & R. 381, S. C.

In cases of injuries from *fraud*, wholly unconnected with contract, case is the proper remedy; see *post*, "Fraud." For injuries from carelessness or unskilfulness in driving carriages or navigating ships, case lies; and it is the necessary remedy

complained †of, though it might be made the subject of an action on promises (*assumpsit*), is in its nature a tort, and in violation of a legal obligation created by a given state of facts, see *ante*, 496, note (*a*). It lies therefore against *Agents*, at the suit of their employers, for neglect or unskilfuluess in the execution of the business which they were retained to perform, see Samuel *v.* Judin, (*in error*), 6 East, 333; Elsee *v.* Gatward, 5 T. R. 143. The forms of declaration in *assumpsit*, 47 to 57, will assist in framing a declaration *in case* against an agent. Care must be taken in *Case* not to charge a *promise* or *undertaking* to use due care, &c. see Corbett *v.* Packington, 6 B. & C. 268. The declaration should state that the agent "before and at the time of the committing of the grievances hereinafter mentioned had been and was retained to [sell and dispose of goods, [*&c. as the case may be,*] for reward, [*&c.*] *and thereupon it became and was the duty* of the defendant as such agent to use due care, [*&c.*]] yet the defendant not regarding his duty," [*&c. laying the breach as in assumpsit.* See forms against "attornies," "bailees," *post*, 500, 502.

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where the defendant's servant had at the time the control of the vehicle or ship; but in the other instances trespass for the direct force and immediate injury is maintainable. *Case* does not lie for a *malicious* injury of this description; Williams *v.* Holland, 6 C. & P. 23; 10 Bing. 112, S. C.; 3 M. & S. 540, S. C. For *irregular* distresses for *rent*, where there was a right to distrain, case is the proper remedy; see title "Distresses," *post*. It is the only form of action that can be adopted for the infringement of a patent, the invasion of a copyright, and escapes, &c. by sheriffs. The reader is referred to the precedents for information in regard to the numerous other instances in which the form of action is maintainable.

Case also lies on *statutes* giving a right or remedy to a party aggrieved. And in a late case it was held that this form of action may be supported against paving commissioners who neglect to pay the plaintiff a sum of money, contrary to their duty under an act of parliament; Cane *v.* Chapman, 1 Nev. & P. 104.

4th. Case lies for injuries to real property *corporeal;* if the wrongful act be not immediate but consequential, as for digging improperly near the foundations of the plaintiff's house, &c. whereby the house fell, or for nuisances by noise, smells, &c. on adjoining property; but for a direct injury with force *upon* the plaintiff's land, as for an entry *thereon*, or for trespasses with cattle, &c. trespass is the remedy. Case does not lie for injuries to real property where the plaintiff's title is in *reversion*, and he had neither possession nor a possessory title. As regards injuries to *incorporeal* rights, case is the proper remedy, and trespass cannot be supported; as for injuries by obstructing ancient lights, disturbing the plaintiff in the enjoyment of a right of common, market, watercourse, way, or other easement. In some instances case and assumpsit are concurrent remedies for injuries to premises; as between landlord and tenant, on the implied promise or duty of the latter not to commit waste, &c. and of the former not to disturb the tenant in his possession of the property; see *post*, "Landlord and Tenant."

In Case, the *venue* is transitory, unless the action be for torts or nuisances to *real property*, or injuries to *incorporeal* rights connected therewith.

As to the mode of laying the venue, see *ante*, 2, note (*d*).

"In actions of tort for *misfeasance* several counts for the *same injury*, varying the *description* of it, are not to be allowed. In the like actions for *nonfeasance*, several counts, founded on *varied statements* of the *same duty*, are not to be allowed."—*New Rules on Pl.*

## ANCIENT WINDOWS OR LIGHTS.(*b*)

### 1. *Declaration for Obstructing Ancient Lights or Privileged Windows.*

*Commencement as ante*, 1, Form 1, "In an action on the case." *The*

(*b*) An action is maintainable by the tenant in possession, or the owner of the immediate reversion (Com. Dig. Action on the Case for a Nuisance, B.) of a house or other building, to recover damages from the erector, (Roswell *v.* Prior, 12 Mod. 636,) or occupier (Payne *v.* Rogers, 2 H. Bl. 350,) of any building which obstructs the light from his windows, if the plaintiff can prove a valid grant of the privilege, or can show twenty years undisturbed enjoyment of the light by the occupiers of his house, and the defendant should fail to establish that such enjoyment was in consequence of some deed or written instrument, 2 & 3 Will. IV. c. 71, s. 3, Chit. and Hulme's Col. of Statutes, 849; Buller's N. P. and Selw. N. P.; Stark. Ev. 2d edit. tit. "Windows;" Harrison's Ind. tit. "Lights;" 1 Chit. G. P. 745.

By the 3d section of 2 & 3 W. 4, "when the *access and use of light* to and for any dwelling-house, workshop or other building, shall have been *actually enjoyed* therewith for the full period of *twenty years without interruption*, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some *consent or agreement* expressly made or given for that purpose by *deed* or *writing*." (See *the decisions* on the *2d section, post*, "Trespass," particularly Bright *v.* Walker, 1 C. M. & R. 211; 4 Tyr. 502, S. C.; Tickle *v.* Brown, 4 Ad. & E. 369; 6 N. & M. 230, S. C. It is observable that the 3d section does not require an enjoyment "as of right," or under a "claim of right thereto.")

By the 4th section, "each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period *next before some suit or action* wherein the claim or matter, to which such period may relate, shall have been or shall be brought into question; and no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made."

By the 5th section, "in all actions upon the *case*, and other pleadings, wherein the party may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall be deemed sufficient; and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation."

The 7th section enacts, that where the right is by the act deemed to be "absolute and indefeasible," (*vide sect.* 2, *and supra*, *sect.* 3, *as to light enjoyed for twenty years*,) the proviso, or exception, as to infants, &c. and in the case of enjoyment against tenants for life only, &c. shall not be applicable. The words are "provided also, that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods herein before mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible."

A party entitled to the enjoyment of ancient lights, will be deemed to have abandoned his privilege if he suffer the windows to be permanently blocked up for twenty years; Lawrence *v.* Obee, 3 Camp. 514; or in lieu of windows, build a blank wall, and allow it to remain for many (seventeen) years, when his neighbor erects a house; Moore *v.* Rawson, 3 B. & C. 332. And he may so alter the mode in which he has been allowed to enjoy the easement as to lose the right altogether; and, therefore, where a person entitled to light through certain apertures in a barn, converted the barn into a malt-house and cut windows where the apertures had been, it was decided that the judge, at the trial of an action for a subsequent obstruction, ought not to have rejected evidence offered to show that the mode of enjoying the light had been thus altered to the defendant's prejudice; Garritt *v.* Sharp, 3 Ad. &

*venue †is local.*] For that whereas the plaintiff, before and at the times of the committing of the grievances hereinafter mentioned, was, and thence hitherto hath been and still is possessed of a certain messuage or dwelling-house, (*c*) †with the appurtenances, situate in the county aforesaid, in which said messuage or dwelling house, during all the time aforesaid, there of right were and still of right (*d*) ought to be divers, to wit, —— (*e*) [ancient (*f*)] windows, through which the light and air, during all the time aforesaid, ought to have entered and still of right ought to enter into the said messuage or dwelling-house, for the convenient and wholesome use, occupation, and enjoyment thereof; * yet the defendant well knowing the premises, but intending to injure the said plaintiff in this behalf, heretofore, to wit, on the —— day of —— A. D. ——, wrongfully and injuriously erected a certain wall and building near to the said windows respectively, and there wrongfully and injuriously kept and continued the said wall and building for a long time, to wit, from the day and year aforesaid, until and at the time of the commencement of this suit; by means of which several premises the light and air, during all the times aforesaid, were and still are hindered and prevented from coming and entering into and through the said windows, or either of them, into

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E. 325; 4 N. & M. 834; 1 H. & W. 224; Blanchard *v.* Bridges, 5 N. & M. 567. But where no injury is occasioned to a neighbor, a window may be enlarged without losing the right to its original quantity of light; Chandler *v.* Thompson, 3 Camp. 80. Case lies for darkening ancient lights, although the building by which they were darkened was erected under the provisions of the building act, 14 Geo. III. c. 78, s. 43, and the action was not commenced within the time prescribed by that act, and no notice of action given; Wells *v.* Ody, 1 M. & W. 452; 7 C. & P. 410. For however short a period light may have been enjoyed, a vendor, lessor, or one claiming under him, cannot obstruct the light of a building in the possession of his vendee, lessee, or one claiming under either of them, where the window through which such light has access, existed at the time of the sale or demise, for this would be in derogation of his own grant, Palmer *v.* Fletcher, 1 Lev. 122; Compton *v.* Richards, 1 Price, 27; Swansborough *v.* Coventry, 9 Bing. 305; nor can a tenant obstruct the light of a house (adjoining to the land he rents, and in the possession of his landlord, &c.) enjoyed at the time of the execution of his lease; Riviere *v.* Brown, 1 R. & Mo. 24. As to *licences* to open windows, see Bridges *v.* Blanchard, 3 N. & M. 691; 1 Ad. & E. 536; Blanchard *v.* Bridges, 5 N. & M. 567. If the obstruction be continued, a second action may be brought even by a reversioner; Shadwell *v.* Hutchinson, 2 B. & Adol. 97. No diminution of light is a sufficient cause of action, unless it render the building less fit for the purposes for which it was before used; Parker *v.* Smith, 5 C. & P. 438; Back *v.* Stacey, 2 C. & P. 465; Martin *v.* Gabb, 1 Camp. 322; 4 Esp. R. 69. It is not sufficient that a ray or two of light should be obstructed. The question is, whether in consequence of the obstruction, the plaintiff has less light than before, to such a degree as to injure his property in point of value or occupation; Pringle *v.* Wernham, 7 C. & P. 377; Wells *v.* Ody, 7 C. & P. 410.

(*c*) *Or* "workshop" *or* "malt-house," *&c. as the case may be.* Where the declaration in case for injuring a house, stated that the plaintiff was possessed of a "messuage," and the proof showed that he was possessed of and entitled to part only of a house, viz., certain rooms therein: held, that the variance was immaterial; Fenn *v.* Grafton, 2 Bing N. C. 617; 3 Scott, 56, S. C.; see further *ante*, 469, note (*o*).

(*d*) This general statement of the right was sufficient at common law, in *Case* by the party entitled, against a wrongdoer, and is expressly sanctioned by the statute 2 & 3 W. 4, c. 71, s. 5; see *supra*, note (*b*).

(*e*) It is not a material variance to state a greater number than there are in fact—state enough.

(*f*) The word *ancient* is unnecessary, and where the right exists by deed or agreement it is not strictly correct; Compton *v.* Richards, 1 Price, 27.

the said messuage or dwelling-house; and the same hath thereby been rendered and is dark, close, uncomfortable, unwholesome, and unfit for habitation, and the plaintiff hath been and is greatly annoyed and incommoded in the use, possession, and enjoyment of his said messuage or dwelling-house with the appurtenances, and the same hath been and is much deteriorated in value; and also by means of the premises the plaintiff hath necessarily incurred divers expenses, to wit, to the amount of £——, in obtaining light in his said messuage or dwelling-house through and by means of other windows by him opened for that purpose and incidental thereto, and was and is otherwise injured.

### 2. *For continuing an Obstruction erected by another Person.*

*Proceed as in the last form to the asterisk.*] And whereas before and at the time of the committing by the defendant of the grievances hereinafter mentioned, a certain wall and building had been and was wrongfully erected and stood in and upon a certain close near to the said windows, and wrongfully obstructed the light and air from entering through the same into the said messuage or dwelling-house, of all which the defendant, before the commencement of this suit, to wit, on [*&c.*] had notice; yet the defendant intending to injure the plaintiff in this behalf, afterwards and before the †commencement of this suit, to wit, on the day and year last aforesaid, and from thence for a long time, to wit, from thence until and at the time of commencement of this suit, wrongfully and injuriously kept and continued in and upon the said close, and near to the said windows as aforesaid, the said wall and building so there erected and standing as aforesaid, although the defendant, being the occupier of the said close, was, to wit, on the said —— day of —— A. D. ——, requested (*g*) by the plaintiff to remove the said obstruction; and by reason of the defendant keeping and continuing the said wall and building as aforesaid, the light and air during all the time he so kept and continued the same were and are hindered, [*&c. concluding as in the preceding form.*

## ANIMALS.

See "Mischievous Animals."

(*g*) See Brent *v.* Haddon, Cro. Jac. 555; Penruddock's case, 5 Co. R. 100; Winsmore *v.* Greenbank, Willes' R. 583; Salmon *v.* Bensley, R. & M. 189; 3 Chit. Pl. 6th ed. 541, note (*t*).

## ATTORNIES.

### 1. *Declaration in Case against an Attorney for Neglect, &c.*

[*Observations.*—We have seen that either Assumpsit or Case may be brought against an attorney for carelessness or unskilfulness to his client's prejudice, and in violation of the implied promise or duty created by the retainer of the attorney in his professional capacity; see *ante* 6, note (*k*), and the observations on the form of a declaration in *case* against an *agent*, *ante*, 496. Where *case* is adopted against an attorney for neglect, &c. the forms in *assumpsit*, *ante*, 62 to 68, may be readily applied, by alleging that "whereas before the committing of the grievances hereinafter mentioned, to wit, on, [*&c.*] the plaintiff *had* [*instead of* "in consideration that he had"] retained and employed the defendant as an attorney, [*&c.*] to, [*&c.*] for reward, [*&c.*]" and by omitting the *promise* and alleging instead, "and thereupon it became and was *the defendant's duty* as such attorney, to use due and proper care, [*&c. assigning the duty in the terms of the promise in the forms referred to;*] yet [*&c.*] not regarding his *duty*," [*&c. laying the injury as in assumpsit.*] See the Forms 2 Chit. Pl. 5th ed. 669; 6th ed. 468 to 472; Kemp *v.* Burt, 4 B. & Ad. 424. See Form in *case* against an attorney for negligently conducting a suit in chancery, commenced before he was retained, whereby the bill was dismissed, &c., Frankland *v.* Cole, 2 C. & J. 590; and a Form in case for negligently suffering judgment by default in an action he was employed by plaintiff to defend, Godefroy *v.* Jay, 7 Bing. 413; 5 M. & P. 284, S. C. Declaration against an attorney, by his client, for disclosing to a third person a defect in the client's title to an estate, Taylor *v.* Blacklow, 3 Scott, 614; 3 Bing. N. C. 235; against a person, who was plaintiff in a former action, and his attorney, for not releasing the plaintiff (formerly defendant) out of prison after satisfaction of debt and costs, Crozer *v.* Pilling and another, 6 D. & R. 129; 4 B. & C. 26, S. C.; same Form 2 Chit. Pl. 6th ed. 409.]

### 2. *Declaration in Case against an Attorney for wrongfully, as such, bringing an Action against a third Person in Plaintiff's Name, whereby the latter incurred Costs of Discontinuance.* (*h*)

For that whereas heretofore, to wit, on [*&c.*], the defendant, then and still being an attorney of the Court of our lady the queen, before the queen herself at Westminster, contriving and intending to injure the plaintiff, wrongfully and injuriously, without the consent, authority, or

(*h*) See Chit. Arch. 929, 930.

retainer of the plaintiff, and without any just or reasonable cause in that behalf, caused to be issued a writ of summons in an action on promises out of the last mentioned Court against one E. F., in the name and on the behalf of the said A. B. as the plaintiff in such action, for the recovery of a sum alleged to be due to the plaintiff, and under the color and pretence that he the defendant was the attorney of and for the plaintiff in that behalf; and the plaintiff further says, that such proceedings were thereupon wrongfully and injuriously had in the said action against the said E. F. by the said procurement of the defendant, and without the leave or license, authority or consent of the plaintiff, and without any just or reasonable cause, that afterwards, to wit, on [*&c.*], a certain rule or order was made in and by the said last-mentioned Court in the said action, according to the course of practice of the same Court, whereby it was ordered that [*set out the rule to discontinue*]; and the plaintiff further says, that such further proceedings were thereupon had in the last-mentioned action, that afterwards, to wit, on [*&c.*] the said costs were taxed by the proper officer of the last-mentioned Court, upon and by virtue of the last-mentioned order, at a large sum of money, to wit, £——, and for the recovery thereof, a certain writ of attachment was afterwards, to wit, on [*&c.*] issued out of the last-mentioned Court, at the instance of the said E. F., against the plaintiff; and the plaintiff was thereupon then called upon, and forced and obliged to pay, and he then did pay a large sum of money, to wit, the said sum of £—— to the said E. F., together with another large sum of money, to wit, £—— for his costs of and incidental to the said writ of attachment; and thereby also the plaintiff was subjected to, and became liable to pay, and incurred and sustained divers other large expenses, amounting in the whole to a large sum of money, to wit, the sum of £——, for other the costs of the said E. F. in the said action, and the further sum of £——, being his the plaintiff's costs and expenses on occasion thereof, †and in endeavoring to defend himself in the premises and incidental thereto, and also by reason of the premises the plaintiff was and is otherwise greatly injured; To the plaintiff's damage of £——, and therefore he brings his suit, &c.

## BAILEES.

[*Observations.*—Case or assumpsit may be maintained against a bailee of goods for neglect, in violation of his implied promise or duty. See *ante*, 496, note (*a*), and the observations on the form of declaration in case against an *agent* or attorney, *ante*, 496 and 500; and which observations apply to the form in case against bailees. See various forms in assumpsit against bailees, *ante*, 72 to 75, and hirers of goods, *ante*, 121, which may readily be applied, by charging the *duty* instead of the *promise*; see

observations, *ante*, 497 and 500. See various forms in case, 2 Chit. Pl. 5th ed. 669 i to 678; 6th ed. 474 to 479; Williams *v.* East India Company, 3 East, 192; Corbett *v.* Packington, 6 B. & C. 268. Against an engraver for using for his own purposes plates engraved by him for plaintiff; Murray *v.* Heath, 1 B. & Ad. 804. Against "Carriers" and "Waggon Office Keepers," see those titles *post*. The following forms may be useful.]

1. *Declaration against the Hirer of certain Carvings let to hire to be publicly exhibited, for not taking Care of them.*

For that whereas heretofore, to wit, on [*&c.*] the plaintiff, at the request of the defendant, let to hire, and caused to be delivered to the defendant, and he then received and hired of the plaintiff certain goods and chattels, to wit, nine carvings in wood of the plaintiff of great value, to wit, of the value of £——, to be by the defendant kept and exhibited for his own profit and advantage, either in England or elsewhere as he might think fit, for a certain time, to wit, for one year then next at the sum of £—— payable quarterly from the —— day of ——, A. D. ——; and thereupon it then became and was the defendant's *duty* to take due and proper care of the said goods and chattels, and use the same in a reasonable and proper manner during the time he should have the same on hire, upon the terms and for the time aforesaid; yet the defendant not regarding his *duty* in that behalf, did not nor would take due and proper care of the said goods and chattels, or use the same in a reasonable or proper manner during the said time, and the defendant not regarding his said duty and contriving to injure the plaintiffs, afterwards and during that time, to wit, on the day and year last aforesaid, and on divers other days and times after that day and before the commencement of this suit, wrongfully took so little and such bad care of the said goods and chattels, and used the same in so unreasonable and improper a manner, and conducted himself so carelessly, negligently, and improperly in that behalf, †that by reason of the several premises the said goods and chattels then became and were and are greatly broken, damaged, destroyed, and injured, and much deteriorated in value; and the plaintiff hath been deprived of divers gains and profits which he otherwise might and would have derived therefrom; To the plaintiff's damage of £——, and therefore he brings his suit, &c.

2. *By the Owner of Goods left in the Defendant's House by his Consent, for suffering them to be distrained and sold for Rent due from defendant.*

For that whereas, before and at the time of the committing of the grievances by the defendant as hereinafter mentioned, the defendant held

and enjoyed certain rooms and apartments as tenant thereof to one E. F., at and under a certain rent to be paid by the defendant to the said E. F. for and in respect of the defendant's use and occupation of such rooms and apartments; and whereas also, whilst the defendant was such tenant as aforesaid and before and at the time of committing of the grievances by him as hereinafter mentioned, the plaintiff was the owner and lawfully possessed as of his own property of divers goods and chattels, to wit, [*describe them as in trover,*] of great value, to wit, of the value of £——, and the said goods and chattels, to wit, on the —— day of —— A. D. ——, were in the said rooms and apartments by and with the permission and consent of the defendant, to be kept and taken care of by him for the plaintiff, [*according to the fact*]; and thereupon it then became and was the duty of the defendant so long as he continued such tenant to the said E. F., and so long as the said goods and chattels were in the said rooms and apartments of the defendant, by and with the permission and consent of the defendant as aforesaid, to indemnify and save harmless the plaintiff from and against any distress upon his said goods and chattels by the said E. F. for any part of the said rent which might be due and in arrear from the defendant to the said E. F., and from and against any costs, charges, or expenses of such distress; and although the said tenancy of the defendant to the said E. F. continued for a long time, to wit, hitherto, and the said goods and chattels of the plaintiff were, to wit, on the day and year aforesaid in the said rooms and apartments by and with the permission, license, and consent of the defendant; and although, to wit, on the day and year aforesaid, a large sum of money, to wit, the sum of £—— was due and in arrear from the defendant to the said E. F. for the use and occupation of the said rooms and apartments under the said tenancy; yet the defendant not regarding his said duty, but contriving and wrongfully intending to injure and defraud the plaintiff, did not nor would indemnify or save harmless the plaintiff from and against a distress upon the said goods and chattels by the said E. F. for the said rent, but wholly neglected so to do; and by reason thereof during the said tenancy, to wit, on the day and year aforesaid, a distress was made by the said E. F. upon the said †goods and chattels of the plaintiff so being in the said rooms and apartments as aforesaid, for the said sum of £—— so due and in arrear from the defendant to the said E. F. for and in respect of the said rent of the said rooms and apartments as aforesaid; and the said E. F., at the expiration of five days from the taking such distress, to wit, on [*&c.*], sold and disposed of the said goods and chattels of the plaintiff for the said arrears of rent, and the costs, charges, and expenses of the said distress, as he was lawfully entitled to do by reason of the said rent so being in arrear; whereby and by means of the premises, the plaintiff hath wholly lost and been deprived of his said goods and chattels, and hath been and is much prejudiced, injured,

and damnified; To the damage of the plaintiff of £——, and thereupon he brings his suit, &c.

## BANK OF ENGLAND—BANKERS.

[See the form of a declaration against the Bank of England for not transferring stock to the plaintiff's vendee, and pleas thereto, Stracey *v.* The Bank of England, 6 Bing. 754; 4 M. & P. 639, S. C.; Henly *v.* Mayor of Lyme, 5 Bing. 91, 108; Sutton *v.* Bank of England, 1 C. & P. 193.

Against bankers by a customer for not paying the plaintiff's check in favor of a third person, the plaintiff being a customer and having assets, Marzetti *v.* Williams, 1 B. & Ad. 415; 5 Tyr. 268; Whittaker *v.* Bank of England, 6 C. & P. 700. Declaration on banker's checks, *ante*, 100, Forms 1, 2.]

## BOOKING-OFFICE-KEEPER.

See "Waggon Office-Keeper."

## CARELESSNESS.

[See "Agents," "Attornies," "Bailees," "Carriages," "Carriers," "Landlord and Tenant," "Master and Servant," "Ships," "Surgeons," "Waggon Office Keeper."

Case for so negligently constructing a hay-rick on defendant's land, that in consequence of its spontaneous ignition his neighbor's house was burnt down, Vaughan *v.* Menlove, 3 Bing. N. C. 468.]

## CARRIAGES.

### *Declaration in Case against the Owner of a Carriage for carelessly driving it against the Plaintiff's Carriage, &c.* (i)

For that whereas the plaintiff before and at the time of the committing †by the defendant of the grievance hereinafter mentioned, was lawfully

(i) See forms Williams *v.* Holland, 10 C. & P. 501; Croft *v.* Alison, 4 B. & Al. Bing. 112; 3 M. & Scott, 540, S. C.; 6 590; Moreton *v.* Hardern, 4 B. & C. 223;

possessed (*k*) of a certain carriage, to wit, [a cart] and of a certain horse drawing the same, in which said cart the plaintiff was then riding in and along a certain public and common highway, [*or* "and which said carriage was then lawfully in a certain highway,"] and the defendant was then possessed of a certain other carriage, to wit, [a gig,] and of a certain other horse drawing the same, which said gig and horse were then under the care, government, and direction of the defendant, [*or if his servant were driving, it is usually* (*l*) *alleged* "of a certain then servant of the defendant,"] in and along the said highway. Nevertheless the defendant ["by his said servant," *if the fact be so,*] then so carelessly, unskilfully, and improperly drove, governed, and directed, his said gig and horse, that by and through the carelessness, negligence, unskilfulness, and improper conduct of the defendant ["by his said servant,"] the said gig and horse of the defendant then ran and struck with great force and violence upon and against the said *cart* and horse of the plaintiff, and thereby then crushed, broke to pieces, and damaged the same; and the

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6 D. & R. 275, S. C.; 2 Chit. Pl. 6 ed. 493. The action may be in *trespass*, unless the defendant's carriage was under the care of his servant at the time the injury was inflicted, in which event the action must be in *case;* 1 Chit. Pl. 6 ed. 131. The latter form of action lies although the defendant himself were driving, and the injury were forcible and immediate, the negligence or unskilfulness being charged as the gravamen; Wells *v.* Ody, 1 M. & W. 462; Moreton *v.* Hardern, *ubi supra;* Williams *v.* Holland, 6 C. & P. 23; 10 Bing. 112; 3 M. & Scot, 240, S. C. But where the act was wilful or malicious, trespass appears to be the proper remedy. Where the defendant's cart was under the care of his servant it was decided that the defendant was responsible, although the servant being in the carriage had, at the time of the collision, intrusted the reins to a stranger, who was riding with the servant; Booth *v.* Mister, 7 C. & P. 66. Liability of person whose name is on a cart, &c. though not the owner; Stables *v.* Eley, 1 C. & P. 614. It has been held that the *master* is not liable if the collision were occasioned entirely by the wilful, and not the negligent or unskilful, conduct of his servant; see M'Manus *v.* Crickett, 1 East, 106; Croft *v.* Alison, 4 B. & Al. 590. Where both parties plaintiff and defendant are equally to blame no action lies, see Williams *v.* Holland, *supra*, and *post, Pleas.* The circumstance of the law of the road, as it is termed, not having been observed, is it seems not conclusive evidence that the party disregarding it was guilty of negligence upon the occasion in question, but it will furnish presumptive evidence of carelessness against such party, where it does not clearly appear that the other party could by ordinary care or precaution have avoided the collision; Wordsworth *v.* Willan, 5 Esp. R. 273; Clay *v.* Wood, *id.* 44; Pluckwell *v.* Wilson, 5 C. & P. 375; Wayde *v.* Carr, 2 D. & R. 255; Chaplin *v.* Hawes, 3 C. & P. 504; Boss *v.* Litton, 5 C. & P. 407. In Laugher *v.* Pointer, 5 B. & C. 547, the Court were equally divided in opinion upon the question whether the owner of a carriage, who had hired of a stable-keeper a pair of horses to draw it for the day, was liable for an injury occasioned by the negligent driving of a person provided by the owner of the horses as a driver. In Brady *v.* Giles, 1 Moo. & Rob. 494, Lord Abinger, C. B. said it should be left as a question of fact for the jury, whether the driver was at the time acting as the servant of the defendant or the other party.

The driver is a competent witness for his master the defendant without a release, his name being indorsed on the record under 3 & 4 W. 4, c. 42; Yeomans *v.* Legh, 2 M. & W. 419. As to the liability of coach-proprietors to their *passengers* for carelessness, and forms, see Chitty, jun. Cont. 2 ed. 385, 386; 2 Chit. Pl. 6 ed. 456 to 458; Sharp *v.* Grey, 9 Bing. 457; 2 M. & Scott, 620, S. C.; *post*, 507, 508.

(*k*) If the plaintiff had let the carriage for an unexpired term, and was not entitled to possession but was owner in *reversion*, the declaration should be framed accordingly, see *post* "Reversion."

(*l*) But under an allegation that *defendant* had the care and was guilty of neglect, proof that his servant was the driver, &c. would be admissible; Brucher *v.* Fromont, 6 T. R. 659; M'Manus *v.* Crickett, 1 East, 110. *Qui facit per alium facit per se.*

said cart of the plaintiff thereby then became and was rendered of little or no use or value to the plaintiff, and the plaintiff was necessarily subjected to and incurred a great expense, to wit, £—— in repairing the said cart, and was deprived of the use thereof for a long time, to wit, —— months, during which time the plaintiff was obliged to hire another cart at a great expense, to wit, £——, and thereby also the plaintiff was then cast and thrown with great force and violence from and out of the said cart to and upon the ground there, and became and was sick, sore, [*&c. state illness and consequent injury and expense as post*, 508, Form, 3.] To the plaintiff's damage of £——, and therefore he brings his suit, &c.

## CARRIERS.

[See in general as to liabilities, &c. *ante*, 94, note (*p*). Against coach and waggon office keepers, *post* "waggon office keepers." Carriers may be sued for the consequences of their neglect in regard to the carriage or delivery of goods, either in *assumpsit* or *case*, see *ante*, 496, note (*a*), and the forms in *assumpsit*, *ante*, 94 to 100. The leading distinction between the forms in assumpsit and those in case is, that in assumpsit a *promise* to perform the duty required by the express or implied contract of the parties must be laid in the declaration: in *case* the declaration must not charge a promise, but after stating the delivery to defendant as a common carrier, should show the *duty* imposed on him, and then the breach may be stated as in assumpsit. The forms in assumpsit may, therefore, be readily applied to case: the following are given chiefly to illustrate the distinction alluded to.]

### 1. *Declaration in Case against a Common Land Carrier on his Common Law Liability* (*m*) *for losing Goods.*

For that whereas heretofore, to wit, on [*&c.*] the defendant was a common carrier of goods for hire, to wit, from A. to B. and the plaintiff then delivered to him as such carrier, and he then received from the plaintiff divers goods, to wit, [*&c.*] of great value, to wit, £—— of the plaintiff, to be carried for him by the defendant as such carrier, from A. to B. aforesaid; and at B. aforesaid to be delivered by the defendant for the plaintiff for reward to the defendant, and it then became the defendant's duty safely and securely to carry, and convey, and deliver the said goods

(*m*) See *ante*, 94, Form 5, and *id.* note (*p*), and notes there; Harris. Ind. tit. Carriers. It is a variance to declare against defendant as a *carrier* where he is a *wharfinger*, engaging only to *forward* goods; Parry *v.* Fairhurst, 2 C. M. & R. 190. And *qu.* Whether such variance is amendable at the trial, under 3 & 4 W. 4, c. 42, s. 24, *id.*; see forms of declaration in case against a carrier, *id.* and 2 Chit. Pl. 5 ed. 651; 6 ed. 459.

as aforesaid: yet the defendant neglecting his said duty did not safely or securely carry or convey the said goods from A. to B. aforesaid; nor at B. aforesaid safely or securely deliver the same for the plaintiff; but then so negligently and improperly behaved and conducted himself in that behalf that by and through the negligence, carelessness, and default of the defendant in the premises, the said goods then became and were and are wholly lost to the plaintiff; To the plaintiff's damage of £——, and therefore he brings his suit, &c.

## 2. *Case against a common Land Carrier for losing Goods by gross Neglect.*

[This applies where the carrier is protected by the Carriers' Act, *except in regard to gross neglect*, see *ante*, 94, note (*p*), and the form in *assumpsit*, *ante*, 96, Form 6. That form may readily be adapted to *case* by charging "that on, &c. plaintiff delivered," &c. [omitting "in consideration that,"] "and thereupon it became defendant's *duty*," instead of that he "*promised* to take due care," &c. "yet defendant not regarding his *duty*," &c. It is reported to have been decided, that if a declaration in case against coach proprietors for an injury received by the overturning of a coach, state it was their duty to carry the plaintiff "safely" for a certain hire, it does not mean to carry safely at all events, but will be supported by proof of the want of due care; Harris *v.* Costar, 1 C. & P. 636, Best J.; and see Smith *v.* Horne, 2 Moore, 18; 8 Taunt. 144; Holt, 643, S. C. But *semble*, a carrier protected by the act is more properly charged with a duty *to use due care*, and breach of *that* duty, where the action is for *gross* neglect only.]

## 3. *Case against a Coach Proprietor for negligently driving the Coach, whereby Plaintiff, a passenger, was injured.* (*n*)

For that whereas before and at the time of the committing of the grievances hereinafter mentioned, the defendant was the proprietor of a certain common stage-coach used by him in carrying passengers from Oxford to Leamington for hire and reward to the defendant, and the defendant being such proprietor heretofore, to wit, on [*&c.*] received the plaintiff upon his said coach as a passenger, to be carried and conveyed as such from Oxford aforesaid to Leamington aforesaid for reward to the defendant in that behalf, and by reason thereof it became and was the defendant's duty to use due care in causing the plaintiff to be conveyed from Oxford aforesaid to Leamington aforesaid, as such passenger by the said coach; yet the defendant not regarding his duty in that behalf,

(*n*) See form, &c. Curtis *v.* Drinkwater, 2 B. & Ad. 169; and a special form in *assumpsit*, *ante*, 98, and *id.* note (*b*).

did not nor would use due care in causing the plaintiff to be conveyed from Oxford aforesaid to Leamington aforesaid as such passenger by the said coach, and then conducted himself so carelessly and improperly in that behalf, that by reason of the carelessness and default and improper conduct of the defendant by his servant, in the conveyance of the plaintiff as such passenger by the said coach from Oxford aforesaid to Leamington aforesaid, he the plaintiff was then thrown off the said coach and cast upon the ground, and greatly bruised, lacerated, hurt and wounded, and became and was sick, sore, lame and disordered, and so remained from thence hitherto, during all which time the plaintiff suffered great pain and anguish, and thereby the plaintiff during all that time was prevented from carrying on and transacting his lawful and necessary affairs and business, and in consequence thereof lost and was deprived of divers gains and profits which otherwise might and would have accrued to him, and thereby also the plaintiff was necessarily subjected to and incurred divers expenses, to wit, to the amount of £—— in endeavoring to be cured of the said wounds, injuries, sickness, soreness, lameness and disorder, incidental thereto, and to great and extraordinary expenses in providing himself with board and lodging and other necessaries, and in travelling and otherwise, and was and is otherwise damnified; To the plaintiff's damage of £——, and therefore he brings his suit, &c.

### 4. *Case against Stage-coach Proprietors, by a Passenger, for the Loss of his Luggage.* (*o*)

For that whereas the defendants before and at the time of committing the grievances hereinafter mentioned, were owners and proprietors of a certain common stage-coach for the carriage and conveyance of passengers and their luggage from S. to Y., for hire and reward to them, the defendants, in that behalf. And the defendants, being such owners and proprietors, thereupon heretofore, to wit, on [*&c.*] the plaintiff, at the request of the defendants, became and was a passenger in the same coach, to be safely and securely carried and conveyed thereby, together with his luggage, from S. to Y., for reward to the defendants in that behalf, and the defendants then received the plaintiff as such passenger with his luggage, to wit, a certain bag containing divers goods and chattels of the plaintiff, to wit, ten coats, &c. [*describe them as in trover*] of great value, to wit, of the value of 50*l.*, and thereupon it then became and was the duty of the defendants to use due and proper care that the plaintiff and his luggage should be safely and securely carried and conveyed by and upon the said coach from S. aforesaid to Y. aforesaid; yet the defendants not regarding their duty in that behalf did not use due and

(*o*) Form, &c. Miles *v.* Cattle, 6. Bing. 743; 4 M. & P. 630, S. C. Form of declaration in case against a *coach proprietor* for the loss of a parcel *not luggage*, of a passenger, Macklin *v.* Waterhouse, 5 Bing. 212.

proper care in and about the carriage and conveyance of the plaintiff's said luggage by and upon the said coach from S. aforesaid to Y. aforesaid, but wholly neglected so to do; and then so carelessly and negligently conducted themselves with respect to the said luggage of the plaintiff upon the said occasion, that the same by and through the carelessness and negligence and default of the defendants in that behalf then became and was, and is totally lost to the plaintiff; To the plaintiff's damage of £—, and therefore he brings his suit, &c.

### 5. *Case against Ship-owners for negligently losing Plaintiff's Goods.*

[See Form, &c. Newberry *v.* Colvin, 1 C. & J. 192; 7 Bing. 190; 4 M. & P. 876, S. C. Declaration in case against the master of a barge, who deviated from his course, showing that a storm arose and that plaintiff's goods were injured, &c., Davis *v.* Garrett, 6 Bing. 716; 4 M. & P. 540, S. C. Other Forms, 2 Chit. Pl. 6th edit. 464 to 467. On the bill of lading, Colvin *v.* Newberry, 8 B. & C. 166. As to the liability of ship-owners, Abb. Ship. 5th edit. In general the consignee should sue, see 1 Chit. Pl. 5th edit. 6, 7, 6th edit. 6—61, 152; Sargent *v.* Morris, 3 B. & Ald. 277; Joseph *v.* Knox, 3 Camp. 320. Against captain on bill of lading, 2 Chit. Pl. 6th edit. 464.]

## COACH-OFFICE KEEPER—STAGE-COACH PROPRIETOR.

See "Waggon-office Keeper,"—"Carriers."

## COMMON OF PASTURE. (*p*)

### *Declaration for obstructing the Plaintiff's Right of Common.*

[The following Form was framed by an eminent barrister, since the

(*p*) Common of pasture is an incorporeal hereditament, and is a right of feeding one's beasts on the land of another; and it is either appendant, appurtenant, or in gross; Co. Litt. 122; 2 Bla. Com. 33; Com. Dig.; and Bac. Ab. "Commons;" 2 Stark. Ev. 224, tit. "Common;" 1 Selw. N. P. 8th edit. tit. "Common;" 1 Chit. Gen. Pr. 212, 213; 1 Harrison's Ind. tit. "Common;" Willes Rep. 319. Common *appendant* is a right belonging to the owners or occupiers of *arable* land to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are either beasts of the plough or such as manure the ground; 1 Bla. Com. 32, 33. It must (at common law) have existed from time *immemorial;* 1 Sel. N. P. 425. Common *appurtenant* ariseth from no connexion of tenure, nor from any absolute necessity, but may be annexed to lands in other lordships, or extend to other beasts besides such as are generally commonable, as hogs, goats, or the like, which neither plough nor manure the ground. This not arising from any natural propriety or necessity like common appendant, is there-

New Rules. See Form and notes, 2 Chit. Pl. 6th edit. 568; Pindar *v.* Wadsworth, 2 East, 154. The *venue* is local.]

†For that whereas the plaintiff before and at the times of the committing of the grievances hereinafter mentioned was and still is lawfully possessed of a certain messuage, and divers, to wit, 100 acres of land, with the appurtenants, situate and being in the said county of ——, to wit, in the parish of ——, within the said county, and *by reason thereof* (*r*) during all the times aforesaid, of right ought to have had (*s*) and still of

fore not of general right, but can only be claimed by immemorial usage and prescription, which the law esteems sufficient proof of a special grant or agreement for this purpose; 1 Bl. Com. 33; Sel. N. P. 426, 427. Common in *gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor; 1 Bla. Com. 34; Sel. N. P. 428. It may be granted for all manner, and for an *unlimited*, or for a certain number, of cattle, *id.* By the Prescription Act, 2 & 3 Will. 4, c. 71, (Chit. & Hulme's Col. Stat. 849,) reciting that "Whereas the expression, 'time immemorial or time whereof the memory of man runneth not to the contrary,' is not, by the law of England, in many cases, considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is, in many cases, productive of inconvenience and injustice, for remedy thereof it is enacted, that no claim which may be lawfully made at the common law by custom, prescription, or grant, to *any right of common or other profit or benefit to be taken and enjoyed from or upon any land* of our sovereign lord the king, his heirs or successors, or any land being parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate (except such matters and things as are herein specially provided for, and except tithes, rent and services) shall, where such right, profit or benefit shall have been actually taken and enjoyed by any person *claiming right thereto without interruption for the full period of thirty years*, be defeated or destroyed by showing only that such right, profit or benefit, was first taken or enjoyed at any time prior to such period of thirty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated, and when such right, profit, or benefit, shall have been so taken and enjoyed as aforesaid, for the full period of *sixty years*, the right thereto shall be deemed *absolute and indefeasible*, unless it shall appear that the same was taken and enjoyed by some *consent or agreement* expressly made or given for that purpose *by deed or writing*."

The 4th, 5th and 7th sections of the act have been already cited at length, see *ante*, 498, note (*c*). Proof of possession of *land* only would suffice on this allegation; Ricketts *v.* Solway, 2 B. & Ald. 360; 1 Chit. R. 104, 112, S. C.; 2 Stark. Ev. 225.

(*r*) These words appear unnecessary, and should be omitted, if the plaintiff claim by grant; see *ante*, 509, note (*p*).

(*s*) The general form of showing the title was sufficient, before the late act shortening the time of prescription, and is expressly sanctioned thereby, *ante*, 498, note (*b*). Still the right must be stated accurately, and if it be subject to any condition precedent, as a money payment to the lord; Bolam *v.* Atkinson, cor. *Bayley*, J., Northumberland summer assizes, 1827, 2 Stark. Ev. 2d edit. 225; or be subject to restriction or qualifications as to the number of cattle, see 1 Saund. 28, n. 4, 346 b, c; 2 *id.* 327; Brook *v.* Willett, 2 H. Bla. 234; How *v.* Strode, 2 Wils. 269; Manifold *v.* Pennington, 4 B. & C. 161; 6 D. & R. 291, S. C.; or the time of enjoyment, 2 Saund. 2, 3; Musgrave *v.* Cave, Willes, 320; Smith *v.* Flower, 3 Bing. 401; the restriction must be stated. But an allegation of a right "at all times" means "all usual times of the day;" Brook *v.* Willett, 2 H. Bla. 224, 234. As to the statement of the right in a common field, enjoyed with other persons, Cheesman *v.* Hardman, 1 B. & Al. 706; 2 Stark. Ev. 2d ed. 225; Piggott *v.* Bayley, 6 B. & C. 16; 9 D. & R. 12, S. C. As to levancy and couchancy, see Scholes *v.* Hargreave, 5 T. R. 46; Benson *v.* Chester, 8 T. R. 396; 1 Saund. 28, n. 4, 346 b; 2 Stark. Ev. 2d ed. 225; Selw. N. P. tit. "Common." It need not be proved the land was actually *used* for supporting the cattle; Bolam *v.* Atkinson, *Bayley*, J., Northampton summer assizes, 1827, 2 Stark. Ev. 2d ed. 225, note (*c*).

right ought to have common of pasture for all his commonable cattle levant and couchant, in and upon his said messuage and land with the appurtenants in a certain place, waste, or common, situate in the parish aforesaid, being parcel of a certain large tract of land, called ——, to wit, the several places in the declaration hereinafter mentioned, whereon the grievances are alleged to have been committed [*or* "in a certain place called ——, situate in the parish aforesaid, in the county aforesaid"] every year and at all times of the year as to the said messuage and land, with the appurtenants of the plaintiff belonging and appertaining; yet the defendant well knowing all the aforesaid premises, but contriving and intending to injure and aggrieve the plaintiff in this behalf, and to obstruct, disturb and hinder him in the due and rightful exercise of his said right of common, while the plaintiff was so †possessed of his said messuage and land with the appurtenants, and entitled to such common of pasture as aforesaid, to wit, on the —— day of ——, A. D. ——, and on divers other days and times between that day and the commencement of this suit, wrongfully and injuriously (*t*) erected, made, put and placed certain fences in and upon the said waste or common, and thereby and therewith inclosed a certain part, to wit, two acres of the said waste or common, and thereby separated and divided the same from the residue of the said waste or common, and also during all the time aforesaid there wrongfully and unjustly kept and continued the fences so erected, made, put and placed as aforesaid, and the part of the said waste or common so separated and divided as aforesaid:—And the defendant further contriving and intending as aforesaid, whilst the plaintiff was so possessed of his said messuage and land, and well entitled to such common of pasture as aforesaid, to wit, on the several days and times aforesaid, with spades, pickaxes, and other instruments, disturbed, dug up, and subverted the earth and soil of other parts of the said waste or common, and made and dug therein divers, to wit, 500 holes of great depth, to wit, of the breadth and depth of twenty feet respectively, and then put, planted, and placed therein, divers trees, shrubs, saplings and bushes, to wit, 500 thereof respectively, and wrongfully and injuriously kept and continued the same earth and soil so subverted and dug up, and the said holes so dug, and trees, shrubs, saplings and bushes so planted as aforesaid, from the respective times aforesaid hitherto:—And the defendant further contriving and intending as aforesaid, on the several days and times aforesaid, wrongfully and unjustly, with spades and other such like instruments, cut and dug up other great part, to wit, 1000 square yards of the turf of the said waste or common, and took and carried away divers, to wit, 1000 cart loads of turf so cut as aforesaid:—And the defendant further con-

(*t*) Of course only such of the following modes of obstruction as apply to the particular case, will be stated. Statement of grievance by taking away the manure dropped by cattle and impoverishing the herbage; Pindar *v.* Wadsworth, 2 East, 154. A general allegation of obstruction seems to be improper; Tebbutt *v.* Selby, 1 N. & P. 710, 716, 717.

triving and intending as aforesaid, on the several days and times aforesaid, wrongfully put divers, to wit, [100 sheep] in and upon the said waste or common, and there kept the same during the times aforesaid;—whereby and by means of the several premises the plaintiff during all the time aforesaid hath been and is greatly injured and disturbed (*u*) in the use and enjoyment of his said common of pasture there, and could not, nor can he have or enjoy the same in so large, ample or beneficial a manner as he otherwise during all that time might and could have done; To the damage of the plaintiff of £——, and therefore he brings his suit, &c.

## †COPYRIGHT.

[*Case* is the proper remedy for piracy of the copyright of a work; see the law and Forms, 2 Chit. Pl. 6th edit. 533,† and notes; Godson on Patents; 1 Chit. Col. Stat. tit. "Copyright;" 2 Stark. Ev. tit. "Privilege;" 1 Harrison's Ind. and Addenda, tit. "Copyright."

For piracy of *music*, Clementi *v.* Walker, 2 B. & C. 861; 4 D. & R. 598, S. C.; 2 Chit. Pl. 5th edit. 761 a; 6th edit. 534, same form; White *v.* Gerock, 2 B. & Ald. 298. Forms for pirating a *print* contrary to 8 Geo. 2, c. 13, s. 1, (see also 7 Geo. 3, c. 38; 17 Geo. 3, c. 57;) West *v.* Francis, 5 B. & Al. 737; Brooks *v.* Cock, *infra;* 2 Chit. Pl. 5th edit. 762, 6th edit. 535; 1 Chit. Coll. Stat. tit. "Copyright—Prints;" Page *v.* Townsend, 5 Sim. 305; Martin *v.* Wright, 6 *id.* 297.

No action for the piracy of a *print* can be sustained unless the date of the first publication was engraved on the plate according to 8 Geo. 2, c. 13, s. 1; Brooks *v.* Cock, 3 Ad. & E. 138; 1 Har. & W. 129, S. C.; 4 N. & M. 652, S. C.

For piracy of the *model of a bust*, Gahagan *v.* Cooper, 3 Campb. 112.

Piracy of *dramatic* literary property, 3 & 4 Will. 4, c. 15; Cumberland *v.* Planché, 1 Ad. & E. 580; 3 N. & M. 537, S. C.

Of *Lectures*, 5 & 6 Will. 4, c. 65; Chit. & Hulme Col. St. 191, 192.]

(*u*) No proof of actual or specific injury is requisite; Pindar *v.* Wadsworth, 2 East, 154; 2 Stark. Ev. 2d ed. 226. Therefore the plaintiff need not prove he used or attempted to use his right at the time; Wells *v.* Watling, 2 Bla. R. 1233.

## DISTRESSES FOR RENT, &c.(u)

### 1. *Case for Distraining and Selling Goods where no Rent was due, to recover double Value.(x)*

For that whereas the plaintiff, before and at the time of the commit-

(u) By the common law a party making a distress for rent became a trespasser or wrongdoer *ab initio*, if he were guilty of any excess or irregularity in making or conducting the distress, although his right to distrain were clear and undisputed; the *Six Carpenters' case*, 8 Co. 146; Bac. Ab. "Trespass, B.;" Dye *v.* Leatherdale, 3 Wils. 20. This rule still prevails in the case of a distress taken *damage feasant*, *id.*; but is annulled as to distresses for *rent* by the statute 11 Geo. 2, c. 19, s. 19, which enacts, that "where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be *afterwards* done by the party distraining, or his agent, the *distress* shall not therefore be deemed *unlawful*, nor the party making it deemed a trespasser *ab initio*; but the party aggrieved by such wilful act or irregularity shall recover full satisfaction for the *special damage* he shall have sustained and *no more* in an action of trespass or on the case, with full costs." Sect. 20 provides that tender of amends may be made. The true construction of this statute is, that trespass or case must be brought with reference to the *nature* of the irregularity; the main object was to limit the claim to damages for the specific injury received and no more. Trespass or trover is clearly the proper remedy where the distress was *ab initio* illegal and unfounded, as if the relationship of landlord and tenant did not exist, (*post*, 513, note (*a*)); or the goods were privileged, (*post*, 523, Form 11); or no rent was due, (*post*, 513, note (*x*),) &c. It is also sustainable and is the proper remedy, although the *entry* be legal, if there be a subsequent irregularity which is in its nature forcible and matter for that form of action; as if the landlord expel the tenant from the premises or remain therein an unreasonable time; Etherington *v.* Popplewell, 1 East, 139; Winterbourne *v.* Morgan, 11 East, 395. In general, however, *case* is the remedy for a mere subsequent irregularity; see the various forms, *infra*, and notes. And it is often competent to the tenant to waive the trespass or illegality of the entry, and sue in case for a subsequent excess not forcible in its nature, see *post*, 515, note (*f*), 524, form 15. The correct practice in actions for irregular distresses is to make either the landlord alone, (if he can be fixed, see Crabb *v.* Killick, 6 C. & P. 216), or the landlord and the broker defendants, and not to join appraisers, &c.; and if a plaintiff do join them, the judge will oblige him to make out his case by strict rule, and not allow questions to be put to a witness who has been cross-examined, or a witness to be called back with a view to fixing such appraisers, &c.; Child *v.* Chamberlain, 6 C. & P. 213, 484; 5 B. & Ad. 1049; 3 N. & M. 520, S. C. It has been held in replevin against a broker, that if it be proved that the landlord employs the attorney to defend the broker, that is sufficient evidence of the broker's authority to distrain, in the absence of any written warrant; Duncan *v.* Meikleham, 3 C. & P. 172. A count in trover may and should be added where the validity of the distress is denied, and then the plaintiff may without notice proceed on that count; see *post*, 515, note (*f*); See 2 Stark. Ev. 2d edit. 283. Trover lies where a party pays money to redeem his goods illegally distrained without any right of distress; Shipwick *v.* Blanchard, 6 T. R. 298. As to pleas denying the tenancy in Case for irregularity, see *infra*, note (*a*). Frivolous actions of this kind are discouraged, and the judge may and often does certify to deprive the plaintiff of his costs; Irwine *v.* Reddish, 5 B. & Al. 796.

(x) See form, &c. 2 Chit. Pl. 5th edit. 717; 6th edit. 498. By the stat. 2 W. & M. sess. 1, c. 5, s. 5, it is provided, "that in case any such distress and sale as aforesaid shall be made by virtue or color of this present act for rent pretended to be arrear and due, where in truth no rent is arrear or due to the person or persons distraining, or to him or them in whose name or names or right such distress shall be taken as aforesaid, that then the owner of such goods or chattels distrained and sold as aforesaid, his executors or administrators, shall and may, by action of trespass or upon the case, to be brought against the person or persons so distraining, any or either of them, his or their executors or administrators, recover double of the value of the goods or chattels so distrained and sold,

ting of †the grievances hereinafter mentioned, held a certain messuage(*y*) and premises, with the appurtenants,(*z*) as tenant thereof to the defendant C. D.(*a*), at and under a certain rent therefore payable by the plaintiff to the said C. D.,* yet the defendants, contriving and intending to injure the plaintiff in this behalf, heretofore, to wit, on the —— day of —— A. D. ——, wrongfully and injuriously seized and took in and upon the said tenements, with the appurtenants, divers goods and chattels *of the plaintiff*, to wit, —— [*describe them as in trover*,] of great value, to wit, of the value of £——, as and for a distress for certain alleged arrears of the said rent, to wit, the sum of £——, by the defendants then pretended to be due and in arrear to the said C. D. for the said tenements, and afterwards, to wit, on [*&c.*] wrongfully *sold* †the said goods and chattels as such distress for the pretended arrears of rent, whereas in truth and in fact, at the respective times when the defendants distrained and sold the said goods and chattels aforesaid, no rent was due or in arrear to the defendant C. D., for or in respect of the said tenements, with the appurtenants, contrary to the said statute. [*If it be doubtful whether some rent may not have been due, but the distress was for more rent than was in arrear or was excessive, insert a count adapted to such charges, see* Forms 2, 3, *infra. As to a count in trover, see supra, note* (*a*).] To the plaintiff's damage of £——, [*a sum sufficient to cover the double value,*] and therefore he brings his suit, &c.

## 2. *For Distraining for more Rent than was due.* (*b*)

[*Proceed as in* Form 1 *to the asterisk, vide notes thereon:*] Yet the de-

together with full costs of suit." The distress is absolutely void, where *no* rent was due when it was taken, and trespass or trover might be sustained.

(*y*) See *ante*, 469, n. (*o*).

(*z*) The venue is it seems transitory in this action, and therefore the situation of the premises need not be stated, see *ante*, 3, n. (*d*). Variance, Harris *v.* Cooke, 2 Moor, 587.

(*a*) Where the action is in case for an irregularity or excess in making or conducting a distress, and the relation of landlord and tenant is not, from the nature of the charge, denied, it seems to be proper to admit it in the declaration; and assuming that the action is misconceived, and should be in trespass, if that relationship did not exist, it is competent to the defendant to plead that the plaintiff was not tenant as alleged, and under such a plea to put the plaintiff upon proof of a tenancy upon the terms stated. Therefore where the declaration stated a tenancy under a demise from A. and B., and the proof was of a demise by T., the variance was held fatal; see Ireland *v.* Johnson, 1 Bing. N. C. 162; 4 M. & Sc. 706. A formal statement of the demise is not necessary, and in Salter *v.* Bransden, 4 Mod. R. 231, (and see Com. Dig. Distress, D. 9,) it was held, that a declaration in trespass on the 2 W. & M. c. 5, for making a colorable distress, need not state a demise in form, but that it is sufficient to aver that the goods were taken *nomine districtionis*. In Sturch *v.* Clarke, 4 B. & Ad. 113, the plaintiff declared in *case* for taking an excessive quantity of his goods for a certain sum "*alleged* and *pretended* to be due for a poor rate;" and on motion in arrest of judgment, upon the ground that the declaration should have been in *trespass*, as it did not expressly admit any poor rate to be due, it was decided that the declaration was sufficient, at least after verdict.

In whatever form the statement is made, it would seem to be competent to the defendant to traverse a tenancy, where the action is misconceived, if no tenancy exist. Add a count in *trover*, if the existence of a tenancy at a fixed rent be doubtful.

(*b*) Form, &c. 2 Chit. Pl. 5th edit. 719; 6th ed. 500. Mr. Starkie says, that this

fendants, contriving and intending to injure the plaintiff, heretofore, to wit, on [*&c.*] wrongfully and injuriously (*c*) seized and took divers goods and chattels of the plaintiff, to wit, —— [*describing them as in trover*] of great value, to wit, of the value (*d*) of £——, [*or if there be a prior count in which the goods have been described, state* "divers other goods and chattels of the plaintiff, of the like number, quantity, description *and value* as the said goods and chattels in the first count mentioned,"] as a distress for a certain sum of money, to wit, £——, then falsely and wrongfully claimed and pretended by the defendants to be due and in arrear from the plaintiff from the said defendant C. D. for rent of the said premises, and the defendant afterwards, to wit, on the —— day of ——, A. D. ——, wrongfully sold the said goods and chattels as such distress for the said alleged arrears of rent, and the costs and charges of the said distress, and of the appraisement and sale of the said goods and chattels [*or if the goods were not sold, omit the allegation of sale—if the plaintiff paid the sum claimed, say* "wrongfully remained in possession of the said goods and chattels under color of the said distress until the plaintiff afterwards, to wit, on — [*&c.*] was compelled to pay and did pay the defendants the said pretended arrears of rent, and a further sum, to wit, £—— , for the costs and charges of the said distress in order to regain possession of the said goods and chattels,] whereas in truth and in fact, at the time of the making of the said distress and during all the time aforesaid, a small part only, to wit, the sum of £—— (*e*) of the said pretended arrears of rent so distrained for was in arrear to the said defendant C. D. for the rent of

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action is either at common law or under the Statute of Marlbridge, 52 Hen. 3, c. 4, 2 Stark. Ev. 2d ed. 281, n. (*p*); *sed vide* the note to the form in Chitty on Pleading. Neither trespass nor trover could be sustained for the excess. In Wilkinson *v.* Terry, 1 Moo. & Rob. 377, upon a count to the above effect, it appeared at the trial that the goods distrained were not of larger value than the amount really due; and Parke, B. "in summing up the case to the jury, expressed considerable doubt whether the facts stated in the count presented any good cause of action. It was impossible that the tenant could have sustained any damage from the mere circumstance of his landlord having, at the time of the distress, made a claim for more rent than was really due. The substantial question was, whether the landlord had deprived the tenant of more of his goods than the real amount of his debt authorized." Still the facts stated in the count had been proved, "at present, therefore, the plaintiff was entitled to a verdict on that count, with nominal damages, and the validity of the count must be left to be disposed of hereafter." See also Avenell *v.* Croker, M. & M. 172, Tenterden, C. J. It may, therefore, be proper in the above form to allege some special damage, as that the defendants took goods of great value, to wit, to the full value and amount of the pretended arrear of rent hereinafter mentioned to have been distrained for, or to show that the plaintiff (as he ought to do) tendered the real amount due, &c. which was refused, &c. or was prevented from obtaining sureties in replevin for the larger sum, though he could have procured them for the arrears actually due, &c.

Where growing rent has been reduced by payments of land-tax, &c. if the landlord distrain for the whole sum reserved, the tenant may properly sue in case, Carter *v.* Carter, 2 M. & P. 723; 5 Bing. 406.

Plea that the whole arrears were due, and what may be proved thereon; Gambrell *v.* Earl of Falmouth, 4 Ad. & E. 73; *post, Pleas*, "Distress."

(*c*) Malice need not be charged; Field *v.* Mitchell, 6 Esp. R. 71.

(*d*) See *supra*, n. (*b*).

(*e*) In Sells *v.* Hoare, 1 C. & P. 28; 1 Bing. 401; 8 Moor, 451; it was held, that the plaintiff need not prove that the exact sum here laid and no more was due; the substance of the allegation being that more was distrained for than was in arrear.

the said tenements, [whereby, *&c. state damage, if any, see note (b)*], To the plaintiff's damage, [*&c.*]

### 3. *For taking an excessive Distress for Rent due.* (*f*)

For that whereas [*proceed as in* Form 1 *to the asterisk.*] Yet the defendants, contriving and intending to injure the plaintiff, heretofore, to wit,

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(*f*) See form, &c. 2 Chit. Pl. 5th ed. 720, 6th ed. 451; declaration for taking an excessive distress for a poor-rate; Sturch *v.* Clarke, 4 B. & Ad. 113. Neither trespass nor trover lies in the above case; Lynn *v.* Moody, Fitzg. 85; 2 Stra. 851; Hutchins *v.* Chambers, 1 Burr. 590; Whitworth *v.* Smith, 1 M. & Rob. 193, Tenterden, C. J.; unless (it seems) gold and silver be taken to excess, for they are of known value; *id.*; and *per* Ld. Kenyon, Crowther *v.* Ramsbottom, 7 T. R. 658; 2 Stark. Ev. 2d ed. 281, 282, note (*q*). Case upon the Statute of Marlbridge, 52 Hen. 3, c. 2, is the remedy; Hutchins *v.* Whitaker, 2 Ld. Kenyon, 204. The landlord and broker distraining are bound to use due care, and reasonable judgment, skill, and discretion, in regard to the quantity and value of the goods they take, in reference to the amount of rent for which the distress is made. If from gross carelessness or error in judgment, though without malice, (Field *v.* Mitchel, 6 Esp. R. 71,) they levy goods manifestly of much greater value (*id.* 2 Stark. Ev. 283,) than the arrears of rent and the probable costs of the distress, appraisement, and sale, the tenant being the owner of the goods, (Fisher *v.* Algar, 2 C. & P. 374,) may maintain an action on the case against them or any one of them, to recover damages. Where there are several goods upon the premises, the landlord is liable, if he take one article or chattel of much greater value than the rent and costs, the other effects being of less value than the chattel distrained, but sufficient to satisfy his claim; as if he take a cow there being a sheep clearly of sufficient value: but however large the value of the chattel may be, the landlord is justified if there be no other article sufficient for his purpose; see Field *v.* Mitchell, 6 Esp. 71; Avenell *v.* Croker, M. & M. 172. As to an excessive seizure of growing crops, Piggot *v.* Birtles, 1 M. & W. 441. In order to maintain this action, the goods taken need not be sold. The tenant is injured, and may sue, if a man be left in possession and all the goods be subjected to the coercion of the distress, although the effects be not so completely taken from the tenant's control as to prevent him from carrying on his business; Baylis *v.* Fisher, (or Usher,) 7 Bing. 153; 4 M. & P. 790, S. C. And a cause of action once acquired for an excessive distress, is not divested by a subsequent arrangement with the landlord as to the sale; Willoughby *v.* Backhouse, 2 B. & C. 821; 4 D. & R. 539; and see Holland *v.* Bird, 10 Bing. 15; 3 M. & Scott, 363. And the declaration may be in case for an excessive distress, although, by reason of a tender of the rent before the distress, the levy might have been treated as a trespass and void; Holland *v.* Bird, *supra;* Branscomb *v.* Bridges, 1 B. & C. 145; 2 D. & R. 256; 3 Stark. R. 171, S. C. If a count in trover be added, the plaintiff may at the trial abandon the special count for the excess, and dispute the tenancy, and recover on the count in trover (the issue thereon being sufficient to let in such a case), without prior notice that he will take that course; Spargo *v.* Brown, 4 M. & Ry. 638.

At the trial of an action for an excessive distress, the question is, what the goods seized would have sold for at a broker's sale; if it be excessive, the plaintiff is entitled to recover the fair value of the excess; Wells *v.* Moody, 7 C. & P. 59. Where there has been an action of replevin stayed by consent, and the plaintiff has recovered the taxed costs, he cannot in this action recover also as damages the *extra* costs, occasioned to him by the replevin; Grace *v.* Morgan, 2 Bing. N. R. 534; 2 Scott, 790, S. C.; see Phillips *v.* Berryman, 3 Dougl. 286. As to the damages where there is an excessive seizure of crops, Piggott *v.* Birtles, 1 M. & W. 441. To a declaration for an excessive distress for rent, defendant pleaded that the whole sum distrained for was due: held, on issue joined thereon, defendant was not precluded from insisting on certain arrears by the fact, that since they became due other arrears had become due and been distrained for; and this, although on the first distress the warrant and notice stated the distress to be for rent due up to a named day, being subsequent to those on which the arrears now in question accrued, and although on the distress the defendant stated it was for rent due since the last distress; Gambrell *v.* Earl of Falmouth, 4 Ad. & E. 73.

on †[*&c.*], wrongfully and maliciously (*g*) took and distrained for certain arrears of rent, to wit, £——, claimed to be due from the plaintiff to the defendant C. D. for the said tenement, certain goods and chattels of the plaintiff, to wit, [*&c. here describe the goods as in trover. If they have been already set out in a former count, say* "goods and chattels of the like number, quantity, and description as the goods and chattels in the said —— count mentioned,"] of much greater value than the amount of the said arrears of rent, and the costs, expenses, and charges of the said distress, and of the appraisement and sale thereof, to wit, of the value of £——, and thereby took an excessive and unreasonable distress for the said arrears of rent, when, at the time of the taking of the said distress as aforesaid, a certain part of the said goods and chattels so distrained as aforesaid, to wit, ["one half," *or* "third part thereof,"] then was of sufficient value to have satisfied the said arrears of rent and the costs, expenses and charges of the said distress, and of the appraisement and sale thereof, contrary to the statute in such case made and provided; To the damage of the plaintiff, and therefore he brings his suit, &c.

### 4. *For Distraining and Selling without Notice of Distress.* (*h*)

For that whereas the defendants, contriving to injure the plaintiff, on [*&c.*] wrongfully seized and took divers goods and chattels of the plain-

(*g*) Express malice need not be proved; Field *v.* Mitchell, 6 Esp. 71.

(*h*) See a form for impounding the goods off the premises, and not giving notice thereof, 2 Chit. Pl. 5th ed. 722, 6th ed. 503; and see note there. It would seem to be necessary to give notice of distress, although there were no removal or sale; see *id.*; Com. Dig. Distress, D. 7. The omission to give notice would not enable the tenant to support trespass. The above form is founded on the equity and provisions of the statutes, 2 W. & M. c. 5, s. 2; 11 Geo. 2, c. 19, s. 10. By the former statute it is enacted, that "from and after the first day of June, in the year of our Lord 1690, where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion, house, or other most notorious place on the premises, charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff according to law, that then in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish, or place, where such distress shall be taken, (who are hereby required to be aiding and assisting therein) cause the goods and chattels so distrained to be appraised by two sworn appraisers (whom such sheriff, under-sheriff, or constable, are hereby empowered to swear), to appraise the same truly, according to the best of their understandings; and after such appraisement shall and may lawfully sell the goods and chattels so distrained for the best price can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale, leaving the overplus (if any) in the hands of the said sheriff, under-sheriff, or constable, for the owner's use."

By 11 Geo. 2, c. 19, s. 10, after reciting, that "whereas great difficulties and inconveniences frequently arise to landlords and lessors, and other persons taking distresses for rent, in removing the goods and chattels or stock distrained off the premises, in cases where by law they may not be impounded and secured thereupon: and also to the tenants themselves many times by the damage unavoidably done to such goods and chattels or stock in the removal thereof;" it is enacted, "That from and after the said 24th day of June, 1738, it shall and may be lawful to and for

tiff, to †wit, [*&c.*] of great value, to wit, of the value of £——, then being in and upon certain premises, as for and in the name of a distress, for certain alleged arrears of rent, by the defendants claimed and pretended to be due and in arrear from the plaintiff for the said premises, and afterwards, to wit, on [*&c.*] sold and disposed of the said goods and chattels towards satisfaction of the rent for which the same were so distrained, and of the costs and charges of the said distress, and of the appraisement and sale of the said goods and chattels, without having given to the plaintiff a notice of the said distress and of the cause of taking the same, or left such notice at the chief mansion house, or other most notorious place on the said premises, according to the statute in such case made and provided, and therein failed and made default, contrary to the said statute.

### 5. *For not Selling the Goods for the best Price.* (*i*)

For that whereas heretofore, to wit, on [*&c.*] the defendants seized and distrained divers goods and chattels, to wit, [*&c. see* Form 2,] of the

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any person or persons lawfully taking any distress for any kind of rent, to impound or otherwise secure the distress so made, of what nature or kind soever it may be, in such place or on such part of the premises chargeable with the rent, as shall be most fit and convenient for the impounding and securing such distress; and to appraise, sell, and dispose of the same upon the premises, in like directions and restraints to all intents and purposes as any person taking a distress for rent may now do off the premises, by virtue of an act made in the second year of the reign of King William and Queen Mary, intituled *An Act for enabling the Sale of Goods distrained for Rent in case the Rent be not paid in a reasonable time;* or of one other act made in the fourth year of his present majesty, intituled *an Act for the more effectual preventing Frauds committed by Tenants, and for the more easy recovery of Rents and renewal of Leases;* and it shall and may be lawful to and for any person or persons whatsoever, to come and go to and from such place or part of the said premises where any distress for rent shall be impounded and secured as aforesaid, in order to view, and appraise, and buy, and also in order to carry off or remove the same on account of the purchaser thereof; and that if any pound breach or rescous shall be made of any goods and chattels, or stock, distrained for rent and impounded, or otherwise secured by virtue of this act, the person or persons aggrieved thereby shall have the like remedy as in cases of pound breach or rescous is given and provided by the said statute"

As to the form of notice of distress, &c. see Woodf. 2d ed. by Harrison; Moss *v.* Gallimore, 1 Dougl. 279; 9 East, 298. It need not state when the rent became due; *id.* Notice to the tenant personally is good; Walker *v.* Rumbal, Ld. Raym. 53. A landlord may distrain for one cause, and justify or avow for another; see Crowther *v.* Ramsbottom, 7 T. R. 658; Gambrel *v.* Earl of Falmouth, 4 Ad. & E. 73. Notice where growing corn is distrained, 11 Geo. 2, c. 19, s. 8.

(*i*) Form, &c. 2 Chit. Pl. 5th ed. 725 b, 6th ed. 507. This action is founded on 2 Will. & Mary, sess. 1, c. 5. s. 2, cited *ante*, 516, note (*h*). The price at which the goods were appraised will be presumed to be the best until the contrary appear; Walter *v.* Rumbal, 4 Mod. 390; Com. Dig. Distress, D. 8; 2 Stark. Ev. 2d ed. 282, note (*z*). Reasonable care and diligence must be used to obtain the best price; and perhaps the landlord is not justified in parting with the goods for a price manifestly inadequate to their value, although no better be offered at the time, but ought, if only such a price be offered, to defer the sale: by analogy to the instance of a sheriff selling under a *venditioni exponas;* Keightly *v.* Birch, 3 Camp. 521; Barnard *v.* Leigh, 1 Stark. R. 43. In Poynter *v.* Buckley, 5 C. & P. 512, Tindal, C. J. allowed a plaintiff upon the above form of count to prove that the goods were improperly lotted, and were allowed to stand in the rain. In general, no particular order is required by law to be observed on the sale of goods of different descriptions, as that beasts of the

plaintiff, †of great value, to wit, of the value of £——, then found and being in and upon certain premises, with the appurtenances, as and for and in the name of a distress, for certain arrears of rent alleged to be due to the defendant, [*or* E. F.,] for the use and occupation of the said premises, with the appurtenances, and the defendants afterwards, to wit, on the —— day of ——, in the year aforesaid, sold the said goods and chattels under color of the said distress, for and towards payment and satisfaction of the said supposed arrears of rent and the charges of the said distress and sale; yet the defendants, contriving and intending to injure the plaintiff in this behalf, did not nor would sell, or use due care or diligence in endeavoring to sell, the said goods and chattels under the said distress for the best price that could and might have been gotten for the same, but on the contrary thereof, the defendants then, to wit, on the day and year aforesaid, wrongfully and injuriously sold the said goods and chattels for much less than the best price, (that is to say) for £—— less than the best price that could and might have been gotten and received for the same, had the same been sold with due care and in a due and proper manner by the defendants.

### 6. *Case against a Landlord and his Broker for selling Goods distrained, without having them appraised by Two Appraisers.* (*j*)

For that whereas [*proceed as in* Form 1, *ante*, 512, *to the asterisk*,] And whereas the defendants heretofore, to wit, on [*&c.*] seized and took divers goods and chattels of the plaintiff, to wit, [*&c. describe them as in trover*,] of great value, to wit, £——, [*if the goods have been described in a former count, make the allegation advised in* Form 2,] then being on the said premises, as a distress for certain arrears of the said rent, exceeding £20, to wit, to the amount of £——; yet the defendants, contriving and intending to injure the plaintiff, afterwards, to wit, on [*&c.*] wrongfully and injuriously, without the plaintiff's consent, (*k*) sold and disposed of the said goods and chattels under the said distress for the said arrears of rent, and the expenses of the said distress and sale, without causing such goods and chattels to be duly †and according to the form of the

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plough should be postponed to other goods: and the sale of such beasts first does not furnish a cause of action; Jenner *v.* Yolland, 6 Price R. 5; 2 Chit. R. 167.

(*j*) See form, &c. 2 Chit. Pl. 5th edit. 725; 6th edit. 506. The action is founded on 2 W. & M. sess. 1, c. 5, s. 2, cited fully, *ante*, 516, note (*h*). It seems on the construction of the 57 Geo. 3, c. 93, *one* appraiser suffices where the distress is for less than £20; Fletcher *v.* Saunders, 6 C. & P. 747; 1 M. & Rob. 375; Bishop *v.* Bryant, 6 C. & P. 484. The broker distraining should not be one of the appraisers; Lyon *v.* Weldon, 2 Bing. 334; Westwood *v.* Cowne, 1 Stark. R. 172; Bul. N. P. 81. The latter should be sworn before the constable of the parish wherein the distress is made; Avenell *v.* Croker, M. & M. 172; and the constable should attend at the time of appraisement, and then before it is made administer the oath; Kenny *v.* May, 1 M. & Rob. 56. The value of the goods, *minus* the arrears of rent, is the measure of damages, with special damage if laid and proved; Knotts *v.* Curtis, 5 C. & P. 322; 2 Tyr. 449, n.; Biggins *v.* Goode, 2 Tyr. 447; 2 C. & J. 364.

(*k*) See Bishop *v.* Bryant, 6 C. & P. 484.

statute in such case made and provided, appraised by two sworn appraisers, contrary to the said statute; To the plaintiff's damage of £——, and therefore he brings his suit, &c.

### 7. *By Tenant against his Landlord and Bailiff, who distrained for Rent, for making extortionate Charges and selling the Goods for the same.* (*l*)

For that whereas the plaintiff, before and at the time of the committing of the grievance hereinafter mentioned, held certain premises as tenant thereof to the said C. D., at and under a certain rent therefore payable by the plaintiff to the said C. D. for the same; and the defendants had taken and seized divers goods and chattels of the said plaintiff, to wit, [*describe them as in trover*] of great value, to wit, £——, being in and upon the said premises, as and in the name of a distress for certain arrears of rent, to wit, £——, due from the said plaintiff to the said C. D. for the same; and the said defendants heretofore, to wit, on [*&c.*] sold and disposed of the said goods and chattels under the said distress; yet the defendants not regarding their duty in that behalf, and contriving and intending to oppress, impoverish and injure the plaintiff, then wrongfully and injuriously and extortionately kept and detained the said goods and chattels, and sold and disposed of the said goods and chattels, under the said distress not only for the said arrears of rent, and the reasonable and legal amount of the charges and expenses of the said distress, appraisement and sale, and incidental thereto, but also for a further large sum of money, to wit, £——, by the defendants then wrongfully and extortionately charged and demanded for the charges and expenses of the said distress and sale, and incidental thereto, over and above and besides the said arrears of rent, and the reasonable and lawful charges and expenses of and incidental to the said distress and the appraisement and sale of the said goods and chattels distrained as aforesaid, such reasonable and lawful charges and expenses then amounting to a certain sum, to wit, £—; and the said defendants thereby then wrongfully, unjustly and illegally extorted and obtained, of and from the said plaintiff, out of the proceeds of the said goods and chattels, as and for the charges and expenses of the said distress, appraisement and sale, a large sum of money, to wit, the said sum of £——, over and above the lawful and reasonable expen-

(*l*) This count was some few years ago adopted in practice; and see per Lord Abinger, C. B., Lyon *v.* Tomkies, 1 M. & W. 608. It was there held, that the reasonableness of the charges might be questioned upon a count for not leaving the overplus with the sheriff; see Form 10, *post*, 521. Assumpsit for money had and received also lies against a broker who receives excessive charges, although the tenant had obtained time to prevent a sale, &c.; Hills *v.* Street, 5 Bing. 37; 2 M. & P. 96, S. C. The 57 Geo. 3, c. 93, regulates and fixes the charges where the sum due does not exceed £20. This statute does not apply where the distress is for more than £20, though the goods are appraised at less; Child *v.* Chamberlain, 5 B. & Ad. 1049; 3 N & M. 520; 5 C. & P. 213. Where the rent exceeds £20, the reasonableness of the charges is a question for a jury, *id.*; see Lyon *v.* Tomkies, *post*, 521, note (*o*).

ses of and incidental to the said distress, appraisement and sale, and over and above the moneys they were entitled to in that behalf, the said arrears of rent being then satisfied; To the plaintiff's damage of £——, and therefore he brings his suit, &c.

8. *By a Tenant against Landlord and Broker, who distrained for Rent, for not taking due Care of the Goods sold or such as remained unsold under the Distress.*

For that whereas [*as in* Form 1, *ante*, 512, *to the asterisk:*] And whereas the defendants, on [*&c.*] seized and took divers goods and chattels of the plaintiff, to wit, [*describe them as in trover,*] of great value, to wit, £——, [*if before described in a former count, see* Form 2,] then being in and upon the premises, as for and in the name of a distress for certain arrears of the said rent; and afterwards, to wit, on [*&c.*] under the said distress, sold a certain part of the said goods and chattels, to wit, [*&c.*] and by and with the proceeds of such sale paid and satisfied the said arrears of rent and the charges of the said distress and sale: and whereas the defendants, under the said distress, had the charge and possession of all the goods and chattels distrained as above-mentioned until the said sale, and for a long time afterwards, to wit, until and upon the —— day of ——, in the year aforesaid, had the charge and possession of the remainder of such goods and chattels so distrained, and which were not sold under the said distress; yet the defendants, not regarding their duty in that behalf, but contriving and intending to injure the plaintiff, did not nor would after the seizing and taking the said several goods and chattels as and for such distress as aforesaid, and until the sale of such part thereof as aforesaid, take due and proper care of the several goods and chattels so distrained, nor did nor would after the sale of such part thereof as aforesaid, and until the return of the remainder thereof to the said plaintiff as hereinafter mentioned, take due and proper care of the said remainder of the said goods and chattels so distrained as aforesaid and remaining unsold in the hands of the defendants, but on the contrary thereof so wrongfully, carelessly, negligently and improperly behaved and conducted themselves with respect to the said several goods and chattels taken as such distress as aforesaid, until the sale of part thereof as aforesaid; and with respect to the remaining part of the said goods and chattels so distrained as aforesaid, after such sale and until the return thereof to the plaintiff, took so little and such bad care of the several goods and chattels upon those several occasions and during those respective periods, that by and through the negligence and improper conduct of the defendants in that behalf, the said several goods and chattels so taken as aforesaid were then, before the said sale of part thereof, and whilst the defendants so had the charge and possession thereof, to wit, on [*&c.*] materially injured and lessened in value and such part thereof as was so sold as last aforesaid produced and fetched upon such sale, much

less, to wit, £—— less than they would have produced if the same had been properly and carefully kept and impounded, and the defendants had not been guilty of the said neglect and misconduct; and the said goods and chattels remaining unsold as last aforesaid were, whilst in the said charge and possession of the defendants, to wit, on, [*&c.*] greatly injured and lessened in value, and were afterwards, to wit, on the day and year last aforesaid, returned by the defendants to the said plaintiff greatly injured, spoiled, damaged and deteriorated in value by and through the said negligence, improper conduct and default of the defendants in that behalf, whereby the plaintiff hath lost and been deprived of divers profits and advantages which would otherwise have accrued to him, and was and is otherwise injured; To the plaintiff's damage of £——, and therefore he brings his suit, &c.

### 9. *Against a distraining Broker for not giving the Tenant a Copy of the Charges of the Distress.* (*m*)

For that whereas [*as in* Form 1, *ante*, 512, *to the asterisk:*] And whereas the defendant, as a broker and bailiff, for and on behalf of the said E. F. (*n*) on [*&c.*] made and levied a distress upon divers goods and chattels, to wit, [*&c.*] of the plaintiff, of great value, to wit, of the value of £—— for certain arrears of the said rent; yet the defendant, not regarding his duty in that behalf, but contriving and intending to injure the plaintiff, did not nor would give a copy of his the defendant's charges, and of all the costs and charges of the said distress, signed by him, the defendant, to the plaintiff, although the defendant was, to wit, on [*&c.*] requested by the plaintiff to give him such copy, and a reasonable time for so doing elapsed before the commencement of this suit, but the defendant hath wrongfully neglected and refused so to do, contrary to the form of the statute in such case made and provided.

### 10. *For not leaving the Overplus of the Proceeds of a Distress with the Sheriff, &c.* (*o*)

For that whereas [*as in* Form 1, *ante*, 512, *to the asterisk:*] And where-

(*m*) By 57 Geo. 3, c. 93, s. 6, every broker or other person who shall make and levy any distress whatsoever, shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him, to the person or persons on whose goods and chattels any distress shall be levied. A landlord who does not personally interfere in the distress, is not liable for the neglect of his broker in not delivering a copy of his charges: Hart *v.* Leach, 1 M. & W. 560; see *post Pleas*, tit. "Distress."

(*n*) Or if the landlord interfered, &c. and be also sued, say, "the said defendants," on, &c.

(*o*) This action is founded on the enactment in 2 W. & M. c. 5, s. 2, stated at length, *ante*, 516, note (*h*). The action is to be brought by the *owner* of the goods. It seems that the owner might demand the overplus of the landlord and broker, (see *Anon.* Lofft, 201; Simpson *v.* Routh, 2 B. & C. 682,) before they have paid it to the sheriff, and bring assumpsit for money had and received; but the nonpayment cannot

as the defendants heretofore, to wit, on [*&c.*] in the county [aforesaid,] to wit, in †the parish of —, in the said county, seized and distrained divers goods and chattels of the plaintiff, to wit, [*&c. here specify the goods as in trover, or if they have been before described in a former count, say,* "goods and chattels of the plaintiff of the like number, quantity, description and value as the goods and chattels in the said —— count mentioned,"] then found and being in and upon the said premises, with the appurtenances there situate, as and for and in the name of a distress for certain arrears of the said rent, to wit, £——; and whereas the defendants afterwards, to wit, on the —— day of ——, in the year aforesaid, sold the said goods and chattels for payment and satisfaction of the said arrears of rent, and the charges of the said distress, appraisement and sale, for divers sums of money, to wit, to the amount of £——, being a much larger sum of money than was sufficient to satisfy and discharge all the rent then due for the said premises with the appurtenances, and all the charges of the said distress, appraisement and sale; and the defendants, with and out of a part of the produce of the said goods and chattels then satisfied the said arrears of rent, and the charges of the said distress, appraisement and sale, leaving in the defendant's hands a great and considerable overplus of the money produced by the sale; yet the defendants, contriving and intending to injure the plaintiff, did not, nor did either of them, after satisfaction of the said arrears of rent and charges as aforesaid, out of the produce of the said goods and chattels so sold, leave the overplus thereof in the hands of the sheriff or under-sheriff of the said county of ——, or either of them, or of the constable of the *parish, hundred* or place where the said distress was so taken as aforesaid, for the use of the plaintiff, so being the owner of the said goods and chattels as aforesaid, although a reasonable time for that purpose elapsed before the commencement of this suit, but the defendants have hitherto wholly neglected and refused so to do, and therein failed and made default, and the plaintiff hath not yet received nor been in any way satisfied for such overplus or any part thereof as aforesaid; and the defendants have wrongfully converted and disposed of the same to their own use, contrary to the statute in such case made and provided.

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be made the subject of an action of trespass or trover. In Lyon *v.* Tomkies, 1 M. & W. 603, it was decided, that the *overplus* which, by the stat. 2 W. & M. sess. 1, c. 5, s. 2, is directed to be left in the hands of the sheriff, under-sheriff or constable, on a distress, for the owner's use, means the overplus after payment of the rent and of the *reasonable* charges; and therefore, that in an action for not leaving the overplus in the hands of the sheriff, &c. the plaintiff may question the reasonableness of the charges. In that case the plaintiff received from the broker the balance remaining after payment of the rent and the actual charges, making no objection as to their reasonableness; held, that it was a question for the jury whether he accepted such balance *in satisfaction*, and if not, whether it was sufficient to satisfy the real balance, but that it was not correct to lay it down as matter of law that such payment and receipt substantially satisfied the requisitions of the statute. The venue is transitory in this action.

REFERENCES TO FORMS FOR OTHER IRREGULARITIES, AND NOTES THEREON.

11. *For distraining Beasts of the Plough and Sheep, there being other sufficient Goods.*

["Unqore est purveu que null home de religion n'autre soit distreinte per bestes, que gaignent sa terre, ne per ses brebis, taunt come lem trove autre destresce et autres chateux suffisaunt," 51 H. 3, st. 4. See Form of Declaration, &c. 2 Chit. Pl. 5th edit. 718, 6th edit. 499; 8 Wentw. 439, 443; Burn's J. tit. "Distress;" Bradby, 262. This action does not lie if there were reasonable ground, upon the appraisement of competent persons, to suppose, at the time, that the other chattels upon the premises would not be sufficient, and the other effects need not first be sold to ascertain the fact. Jenner *v.* Yolland, 6 Price, 3; 2 Chit. R. 167. And beasts of the plough may be taken, if there be nothing else but growing crops; Piggott *v.* Birtles, 1 M. & W. 441. Trespass or trover, without a demand before action, Ward *v.* Ventom, Peake's Add. C. 126, would lie for taking beasts of the plough or sheep, or implements of trade, where there were other sufficient distrainable goods upon the premises, or other privileged goods; F. N. B. 88; Hutchins *v.* Chambers, 1 Burr. 579; Gorton *v.* Falkner, 4 T. R. 565.]

12. *For distraining Tools of Trade, there being other sufficient Goods.*

[Form, &c. 2 Chit. Pl. 5th edit. 718 a, 6th edit. 499. As to this privilege, &c. see the cases Harrison's Ind. tit. "Distress" and Addenda; Burn's J. tit. "Distress." Trespass or trover lies, *suprà*, Form. 11; Brown *v.* Shevil, 2 Ad. & E. 138; 4 N. & M. 277, S. C.]

13. *For making a Second Distress for the same Rent on the same Goods.*

[Forms, &c. 2 Chit. Pl. 5th edit. 720 a, 6th edit. 502; Bishop *v.* Bryant, 6 C. & P. 484; Smith *v.* Goodwin, 4 B. & Ad. 413 [form held good *after verdict*]. Count for making a second distress, there having been a prior distress for the arrears, under which defendant had sold part of the goods, and still retained growing crops seized; Piggott *v.* Birtles, 1 M. & M. 441; [defendant there paid money into court upon that count.] It seems that *Trespass* or *Trover* is the more correct form of action where the second taking is illegal. "It is the duty of a landlord to make a distress at once for his whole rent, if he can find sufficient goods on the pre-

mises; for various distresses are vexatious to the tenant. And therefore at the common law, if the landlord make an insufficient distress when he might have taken more, a second distress for the remainder of the same rent was illegal, for it was his own folly not to have taken enough at first; but if it †appeared that he could not find a sufficient distress on the land, then it seems that even at the common law he might distrain again;" Bradby on Distresses, ch. 5, p. 130. The statute 17 Car. 2, c. 7, s. 4, enables the landlord, in the cases there pointed out, to make successive distresses, if the distress shall not be found to be of value of the arrears distrained for. See further Gambrell *v.* Earl Falmouth, 4 Ad. & E. 73; Pulfrey *v.* Baker, 3 Price, 572.]

### 14. *For driving a Distress more than Three Miles out of the Hundred.*

[Form and law, 2 Chit. Pl. 5th edit. 721, 6th edit. 503, and notes; 1 & 2 W. & M. c. 12, which entitles the party aggrieved to £5, and treble damages; 1 Chit. Col. Stat. 660.]

### 15. *For refusing to restore the Goods on Tender of the Rent and Costs.*

[See the Forms, &c. 2 Chit. Pl. 5th edit. 723, 6th edit. 504. Where the tender is *before scizure*, trespass or trover, not case, is clearly the correct form of action; Branscomb *v.* Bridges, 3 Stark. R. 172; 2 D. & R. 256; 1 B. & C. 145; but even in such instances the tenant may waive the trespass and sue in *Case* for any excess or irregularity; as for taking too many goods, &c.; see *id.*; Holland *v.* Bird, 10 Bing 15. And trover or replevin would lie for a detention or sale after a tender made subsequently to the seizure and before impounding; see Evans *v.* Elliott, 6 N. & P. 606. And trespass lies for a removal of the goods, if a sufficient tender be made after distress taken and before impounding; Virtue *v.* Beasley, 1 M. & Rob. 21. "A tender of the rent upon the land before the distress, makes the *distress* vexatious; tender after the distress and before impounding, makes the *detainer*, and not the taking, wrongful; tender after the *impounding* makes neither the one nor the other wrongful, for there it comes too late, because the case is put to the trial of the law to be there determined;" 8 Co. 147 a; Gilb. by Hunt, 76; 2 Chit. Pl. *supra*, note; 2 Stark. Ev. 282, note (*u*); but in the case of a distress for rent, a sale after tender of the rent and expenses would be illegal, on the equity of 2 W. & M. c. 5; see *id.*

The tender may be made to the landlord, though he distrains by a broker; see Smith *v.* Goodwin, 1 N. & M. 371; 4 B. & Ad. 413; or it may be made to the broker; Evans *v.* Elliott, 6 N. & P. 606. In the

case of a distress taken *damage feasant*, it seems that *case* does not lie for detaining, &c. after tender made subsequently to the seizure, but after impounding, or even before impounding; see Anscomb *v.* Shore, 1 Camp. 265; Sheriff *v.* James, 1 Bing. 341; 8 Moor, 334; 2 Stark. Ev. 2d edit. 282, note (*u*).

### †16. *For Selling the Goods within the Five Days.*

[This is founded on the equity of 2 W. & M. sess. 1, c. 5, s. 2, fully cited *ante*, 516, note (*h*). Case is the proper remedy in this instance, but it does not lie, and trespass or trover should be brought, where an unripe crop of growing corn, taken as a distress, is sold within the five days, such sale being *void;* see Owen *v.* Legh, 3 B. & Ald. 470. The five days given by stat. 2 W. & M. are to be reckoned inclusive of the day of sale; if therefore, *ex. gr.* the distress be made on a Saturday, the sale may be on Thursday; Wallace *v.* King, 1 H. Bla. 13. According to Harper *v.* Taswell, 6 C. & P. 166, (Tindal, C. J.) the landlord must wait five whole days, i. e. five times 24 hours; and therefore where the distress was on Friday at *two* A. M. and the sale was on the following Wednesday at *eleven* A. M. the sale was held to be wrongful.]

### 17. *For not Removing the Goods within a Reasonable Time after the lapse of the Five Days.*

[Form, &c. 2 Chit. Pl. 5th edit. 724 a, 6th edit. 506. This action is on the equity of 2 W. & M. c. 5, s. 2, and 11 G. 2, c. 19, s. 10, cited *ante*, 516, n. (*h*). This form is sometimes adopted, but Mr. Starkie says that "it seems to be clear that the remedy is trespass and not case;" and and see *ante*, 512, note (*a*); Winterborne *v.* Morgan, 11 East, 395. A reasonable time is allowed by law after the five days to remove and sell. The reasonableness of the time is a question for the jury; Pitt *v.* Shew, 4 B. & Ald. 208, *semble*, S. C. as Pitt *v.* Adams, 2 Stark. Ev. 2d edit. 282, note (*y*). Of course if the tenant consent verbally, or in writing, to the delay, he has no ground of action; see Harrison *v.* Bray, 7 Price, 610.]

### 18. *For Selling a Growing Crop before it was gathered and appraised.*

[See Form, &c. 2 Chit. Pl. 5th edit. 725 a, 6th edit. 507. This action is on 11 Geo. 2, c. 19, s. 8; see Owen *v.* Legh, 3 B. & Ald. 470, *supra*, Form 16. In Proudlove *v.* Twemlow, 3 Tyr. 260; 1 C. & M. 326; the remedy was held to be trespass, or in case for the special damage arising from the irregularity and no more. In such action, with a count in tro-

ver, the landlord was held entitled to deduct the rent due to him from the difference between the price which might have been obtained had the sale been regular, and that which was obtained under the irregular sale; so that where no such difference existed, from the crops having been sold for their full value, while the rent due exceeded the produce of that sale, the tenant recovered nominal damages only; *id.*]

†19. *For Selling more Goods than was necessary under a Distress for Rent.*

[Form, &c. 2 Chit. Pl. 6th edit. 508. It would seem doubtful whether trover lies. In Batchelor *v.* Vyse, 1 M. & Rob. 331, Tindal, C. J. held that trover did not lie against the sheriff to recover the value of goods sold in excess beyond what was necessary to satisfy the execution; but it seems the Court of C. P. inclined, on a motion for a new trial, to think that trover might be supported in such case; 4 M. & Sc. 552, S. C. Where the overplus is not paid to the sheriff, Form 10, *ante*, 521, might be sustained.]

## EASEMENTS.

[See "Ancient Lights," "Commons," "Watercourses," "Ways." Case is in general the remedy for the disturbance of a party in the enjoyment of an easement; 1 Chit. Pl. 6th edit. 142; see Hewlins *v.* Shippam, 5 B. & C. 221: 7 D. & R. 783; Prescription Act, 2 & 3 Will. 4, c. 71, *ante*, 497, note (*b*); 509, note (*p*); and decisions thereon, *id.*, and *post*, "Trespass," "Ways." In general the declaration in case for disturbance of an easement, must show an obstruction in the place or thing wherein the plaintiff is entitled; and therefore in case for obstructing the plaintiff in his enjoyment of a right to take water from a cistern, the declaration was, on motion in arrest of judgment after verdict for plaintiff on plea denying such right, held bad, because it alleged that the obstruction consisted in wrongfully locking up a door *leading* to the cistern, without stating that the plaintiff had any *right* to pass *through the door* in question; Tebbutt *v.* Selby, 1 N. & P. 710, E. T. 1837; see form there; and Manning *v.* Wasdale, *id.* 172; Disturbance of Franchises, 2 Chit. Pl. 6th edit. 585.]

## ESCAPES.

### 1. *Against a Sheriff for an Escape on Mesne Process.*

[See Form and law, 2 Chit. Pl. 6th edit. 516, and notes; Blower *v.* Hellis, 1 C. & M. 393; Harris, Ind. tit. "Escape." Form 2 should be added where there is any doubt whether an actual caption can be proved. See *Pleas*, *post*, tit. "Escape." Liability of *late* sheriff; Assignment of prisoner, &c. 3 & 4 Will. 4, c. 99, s. 7; Davidson *v.* Seymour, 1 M. & M. 34.]

### 2. *For not taking the Defendant where the Sheriff had an opportunity.*

[See Forms, &c. 2 Chit. Pl. 6th edit. 518; and in Brown *v.* Jarvis, 1 M. & W. 704. It was there held, that even since the Uniformity of Process Act, the sheriff is bound to arrest a defendant as soon as he can after the delivery of the capias to him, and has not the four months in which to execute it. It was doubted whether he was liable for not arresting where he has an opportunity, without proof of special damage; see *Pleas*, *post*, tit. "Escape."]

### 3. *For an Escape on final Process.*

[*Debt* is the best remedy where the escape is on *final* process, because in debt, in such case, the jury must give the full sum recoverable and due; 1 Saund. 38, n. 2; see forms 2 Chit. Pl. 6th edit. 267 to 275. In *Case* the damages are in the discretion of a jury; but that form of action is judicious where the proof of an actual caption is doubtful, and yet there is evidence to support, in addition to a count for an escape, a count for not taking defendant when an opportunity presented itself; see *Pleas*, *post*, "Escape."]

### 4. *Against the Marshal for an Escape.*

[See Forms, 2 Chit. Pl. 6th edit. 519 to 523; Brazier *v.* Jones, 8 B. & C. 124.]

## FAIRS.

See "Markets," *post*.

## FALSE REPRESENTATIONS.

See "Fraud," "Warranties."

## FERRY.

### *Case for disturbing Plaintiff's ancient Ferry.*

[See Forms and law on this subject, Hussey *v.* Field, 2 C. M. & R. 432; 1 Gale, 165, S. C.; Peter *v.* Kendall, 6 B. & C. 703; 2 Chit. Pl. 5th ed. 814, 6th ed. 580; Trotter *v.* Harris, 2 Y. & J. 285. See the statute for limiting prescriptions, 2 & 3 Will. 4, c. 71, *ante*, 497, note (*b*), 509, note (*p*).

## FISHERY.

### *Case by Owner in Reversion of a Fishery in the Trent, for digging Gravel, &c. in the Bed of the River, and thereby injuring the Breed of Fish.* (*p*)

For that whereas before and at the time of the committing of the grievances by the defendant hereinafter mentioned, a certain several fishery [*or* †"free fishery," *as the case may be*,] with the appurtenances, situate and being in a certain part of the river, called the Trent, in the county aforesaid, to wit, within the lordship of Castle Donington, in the county aforesaid, was in the holding, possession, and occupation of one C. C., as tenant thereof to the plaintiff, the reversion thereof then and still belonging to the plaintiff; yet the defendant well knowing the premises, but intending to injure the plaintiff and to diminish the value of his reversionary estate and interest in the said fishery, whilst the said C. C. was possessed of the same as tenant as aforesaid, and whilst the plaintiff was interested therein as aforesaid, to wit, on the —— day of ——, A. D. ——, and on divers other days and times between that day and the commencement of this suit, wrongfully did dig in the bed of that part of the said river, which was and is the said several fishery, and made and caused, and procured to be made divers, to wit, one hundred large holes, pits, and trenches therein, and thereby subverted, altered, and damaged the bed of the said river, in the said fishery, and there wrongfully kept and continued the said holes, pits, and trenches so dug and made for a long time, to wit, from the time of making

(*p*) See Chitty's Game Laws; Forms in trespass, 2 Chit. Pl. 5 ed. 875, 6 ed. 622.

the same hitherto, and by means of the premises and otherwise, then destroyed the breed and spawn of fish in the said several fishery, and thereby also the said fishery hath been and is greatly injured and diminished in value, and the plaintiff hath been and is greatly injured, prejudiced, and aggrieved in his reversionary estate and interest aforesaid in the said several fishery, so in the holding, possession, and occupation of the said C. C. as such tenant to the plaintiff as aforesaid; To the plaintiff's damage of £—— and therefore he brings his suit, &c.

## FIXTURES.

See "Landlord and Tenant;" "Reversion."

## FOUNDATIONS OF HOUSES, &c.

See "Nuisances."

## FRANCHISES.

See "Easements."

## FRAUD.

### 1. *Declarations in Case upon a Warranty.* (q)

For that whereas the plaintiff, on the —— day of ——, A. D. ——, at

(q) Either assumpsit or case lies for the breach of an express warranty; see 2 Chit. Pl. 5 ed. 679, 6 ed. 480; Williamson *v.* Allison, 2 East, 446; and the plaintiff in such case need not allege or prove that defendant *knew* of the unsoundness, *id.* See forms in *assumpsit*, and notes, *ante*, 187 to 191. Case is the proper remedy where there is a false representation (and *scienter*,) not amounting to a *warranty;* see *id.;* Powell *v.* Edmunds, 12 East, 11; Meyer *v* Everth, 4 Campb. 22; In Vernon *v.* Keys, 12 East, 632; 4 Taunt. 488, S. C. it was held that case did not lie for a mere false representation by the vendee as to the plaintiff's, the seller's, probability of getting a larger price, viz. that defendant's intended partners would not allow him to give more than a certain sum, for it was either a mere false representation of another's intentions, or, at most, a gratis dictum of the bidder upon a matter which he was not legally bound to disclose accurately, and on which it was the folly of the seller to rely; and that the count was bad in not showing that the plaintiff had been damaged by such false representation, as it was not alleged that the intended partner would have bid at all without him, or that he would have joined in giving the additional price.

See form in case for selling a gun to a

†the request of the defendant, bargained with the defendant to buy of him a certain horse, at and for a certain price, to wit, £——, and the defendant by then falsely and fraudulently warranting the said horse to be *sound*, (*q*) then sold the same to the plaintiff for the said sum of money, which the plaintiff then paid to the defendant; whereas in fact the said horse was at the time of the said sale and warranty *unsound;* and the plaintiff avers that by means of the premises the defendant then falsely and fraudulently deceived the plaintiff on the sale of the said horse as aforesaid, and thereby the said horse became [*&c. conclude as in* Form 1, *ante*, 188.

## 2. *Case for using fraudulent means to prevent the Plaintiff from discovering the Unsoundness of a Horse, sold by the Defendant to the Plaintiff.* (*r*)

For that whereas heretofore and before the committing of the grievance by the defendant hereinafter mentioned, to wit, on [*&c.*] the defendant was possessed of a certain horse, and which said horse before and at the time of the sale thereof to the plaintiff hereinafter mentioned, had contracted a certain malady and unsoundness, rendering the said horse of no use or value, to wit, the glanders, and which the defendant then well knew; yet the defendant contriving and intending to injure and defraud the plaintiff in this behalf, by then falsely, fraudulently, and deceitfully using certain false and fraudulent arts and contrivances, and applications to make the said horse appear to be a sound horse and not glandered, and by suppressing the appearance of the said glanders, then sold the said horse, so being unsound and glandered as aforesaid, to the plaintiff: And the plaintiff, not knowing that the said horse was so unsound and glandered, was thereby induced to †buy and then bought the said horse of the defendant, and then paid to him a large sum, to wit, £——, as and for the price and value of the said horse, whereas in truth and in fact the said horse, at the time of the said sale as aforesaid, was unsound and glandered, and of no use or value whatever, and afterwards, to wit, on [*&c.*] died of the unsoundness and glanders aforesaid; whereby [*&c. as in* Form 1, *ante*, 188,] To the plaintiff's damage of £——, and thereupon he brings his suit, &c.

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*third person* upon a false warranty that it was safe, whereby plaintiff, for whose use it was bought, and who used it, was injured; Langridge *v.* Levy, 2 M. & W. 519.

See form in case upon an *implied* warranty on the sale of copper bought by the plaintiff of the defendant (the manufacturer) for sheathing a ship, that the copper was fit for that purpose; Jones *v.* Bright, 5 Bing. 533; 3 M. & P. 155, S. C.; see Gray *v.* Cox, 1 C. & P. 184; 4 B. & C. 115, and 6 D. & R. 208, S. C.; Chit. jun. Cont. 356, 2d edit.

(*q*) Amendment at the trial; 1 M. & Rob. 442.

(*r*) This is clearly a ground of action without reference to a warranty. See a form in case for fraudulently representing a ship bought of defendant to be copper fastened, and keeping it afloat to prevent plaintiff from discovering the truth, Freeman *v.* Baker, 5 B. & Ad. 797; 5 C. & P. 475, S. C.

### 3. *Case for Deceit in selling a Picture as painted by a particular Master, which it was not.* (*s*)

For that whereas heretofore, to wit, on the —— day of ——, in the year of our Lord ——, the plaintiff, at the request of the defendant, bargained with the defendant to buy of him a certain picture, as and for a certain picture painted by a certain master in painting, to wit, —— at and for a large price or sum of money, to wit, the sum of £——, and the defendant by then falsely and fraudulently warranting the said picture to be a picture painted by the said master, then sold the said picture to the plaintiff for the said sum of money then paid by the plaintiff to the defendant: whereas the said picture in truth and in fact was not a picture painted by the said master, all which premises the defendant then well knew. And the plaintiff in fact saith, that the defendant by means of the premises, on the day and year aforesaid, falsely and fraudulently deceived him, the plaintiff, on the sale of the said picture as aforesaid; and the plaintiff avers that the said picture was of much less value than it would have been if painted by the said master, and the said picture thereby became of little use or value to the plaintiff, and thereby the plaintiff hath lost all the benefit and advantage which he might and would have derived from the money paid by him to the defendant for the said picture.

### 4. *For inducing Plaintiff to purchase Defendant's Practice as a Surgeon, &c. by misrepresenting the extent of Business, &c.* (*t*)

For that whereas before and at the time of the committing by the defendant of the grievance hereinafter mentioned, he the defendant was possessed of a certain messuage and shop, and of a certain lease thereof, and †carried on the profession and businesses of a surgeon and apothecary and chemist in the said messuage and shop, and was also possessed of certain fixtures, drugs and medicines and stock, being in the said messuage and shop. And being so possessed the defendant heretofore, to wit, on the —— day of ——, A. D.——, wrongfully and injuriously contriving and intending to defraud and injure the plaintiff, falsely, fraudulently, and deceitfully pretended and represented to the plaintiff, and by fraud induced him to believe and suppose that his, the defendant's prac-

(*s*) See Power *v.* Barham, 7 C. & P. 350; 6 N. & M. 62; 1 H. & W. 683, S. C. It was there held that upon a sale of pictures, a bill of parcels "4 pictures, views in Venice, Canelletti, £160," is evidence from which a jury may infer a warranty that the pictures were the production of that artist; see the prior cases, *id.* and 3 Harr. Ind. 2148; tit. "Warranty; Sale," 3.

(*t*) See form of declaration for misrepresenting the business of a public house purchased by the plaintiff of the defendant, Dobell *v.* Stevens, 3 B. & C. 623; 5 D. & R. 490, S. C.; Meyer *v.* Everett, 4 Camp. 22; 2 Chit. Pl. 5 ed. 688; *id.* 6 ed. 482, 484; Pewtriss *v.* Austen, 2 Marsh. 217; 6 Taunt. 522, S. C. According to Dobell *v.* Stevens, *supra*, *case* lies for the fraudulent misrepresentation, although there be a written agreement between the parties not noticing such representations. See 6 C. & P. 511; also Pearson *v.* Wheeler, R. & M. 303.

tice and business and transactions in his said profession and businesses by him so carried on were much more extensive and were greater and more advantageous than they really were, that is to say, the same produced him a large sum, to wit, £—— per annum, that he had a great many, to wit, four hundred, patients as such surgeon and apothecary, and that eleven were the least of his constant daily visits on his patients, and that the defendant's counter business in his said shop, that is, the proceeds of drugs and medicines and goods sold by him in and from the said shop in the way of his said profession and businesses, amounted to a large sum, to wit, from 25*s.* to 30*s.* per day, and the defendant, by means of such false, fraudulent and deceitful pretences, representations and assertions, and of other false, fraudulent and deceitful representations, devices and stratagems by him then practised with the intent aforesaid, then wrongfully and fraudulent caused and induced the plaintiff to enter into, and the plaintiff confiding and believing in the truth of the said representations and assertions did then enter into, a certain agreement in writing with the defendant, signed by the plaintiff and defendant, whereby it was and is witnessed that the plaintiff agreed to give the defendant the sum of £—— for the said profession and businesses of surgeon, apothecary and chemist, so carried on by the defendant, with the said fixtures, drugs, medicines and stock, with three months introduction to the same by the defendant, £—— being paid down by the plaintiff, and the remaining £——to be paid on the —— day of ——, A. D.——, on which day the plaintiff should take to the said profession and businesses of the defendant so by him carried on, and the plaintiff further saith, that the defendant, by means of the said false and fraudulent representations and statements, stratagems and devices, then also caused and induced the plaintiff to agree to take an assignment from the defendant of the said lease, and the plaintiff then, to wit, on the said —— day ——, in the year aforesaid, paid to the plaintiff the said sum of £——, and confiding in the truth of the said representations did afterwards, to wit, on the —— day of ——, A. D. ——, pay to the defendant the sum of £——, residue of the said sum of £——, upon the faith and terms of the said agreement, and afterwards, to wit, on [*&c.*] aforesaid took an assignment of the said lease, and entered upon the said messuage and shop, and received and took possession of the said fixtures and other effects, and continued in the said shop the profession and businesses of a surgeon, apothecary, and chemist, with due attention and diligence; whereas in truth and in fact the defendant's practice and business and transactions in his said profession and business by him so carried on before and at the time of the making of the said false representation and committing the said fraud produced him much less than £—— per annum, to wit, £—— per annum, and in truth and in fact before and at the time of making the said false representations and committing the said fraud the defendant had not so many as 400 patients, and had many less than 400, to wit, ——

patients as such surgeon and apothecary; and whereas in truth and in fact before and at the time of making the said false representations and committing the said fraud the daily visits of defendant on his patients were many less than 14, to wit, ——; and whereas in truth and in fact before and at the time of making the said false representations and committing the said fraud, the defendant's counter business of and in his said shop, that is, the proceeds of drugs and medicines and goods sold by him in and from the said shop in the way of his said profession and business amounted to much less than from 25*s.* to 30*s.* per day, to wit, ——per day, all which the defendant at the time of making the said false representations well knew, and so the plaintiff saith, that the defendant by means of the several premises falsely and fraudulently deceived him the plaintiff upon the said bargain and sale, and thereby the said profession and businesses, lease, goodwill, fixtures, and effects became, and were and are of little or no use or value to the plaintiff, and the moneys so paid by the defendant to the plaintiff were and are unreasonable, exorbitant and unfair prices in that behalf, and the plaintiff hath incurred divers losses and expenses in carrying on the said profession and businesses in and upon the said tenements, to wit, to the amount of £——, and hath lost the benefit he otherwise might and would have derived from the use and employment of the moneys by him paid to the defendant as aforesaid, and was and is otherwise injured; To the plaintiff's damage of £——, and therefore he brings his suit, &c.

### 5. *For selling to the Plaintiff a Policy of Insurance, which the Defendant had fraudulently effected on the Life of another Person (his debtor), and which the Insurance Office refused to pay.* (*u*)

For that whereas, before and at the time of the effecting the policy of assurance, and making the indenture hereinafter mentioned, the defendant was entitled to receive from the trustees hereinafter mentioned, the dividends and annual produce which should or might at any time during the life of one E. E., since deceased, accrue or grow due and be received for or upon or in respect of the sum of £——, new four per cent. bank annuities, then standing in the names of —— as trustees for the defendant in that behalf; and the defendant being so entitled and interested in the life of the said E. E., for the purpose of effecting an insurance on the life of the said E. E. for the sum of £—— in a certain insurance company or society, to wit, the —— Life Insurance Company, heretofore and before the making of the indenture hereinafter mentioned, to wit, on [*&c.*], subscribed and delivered into the office of the said company, as required by the rules and regulations thereof, a certain declaration in writing as the basis of the said proposed insurance, whereby the said defend-

(*u*) This form was recently drawn and settled with care, in consultation with an eminent counsel.

ant declared and stated to the said company, amongst other things, that the said E. E. had never been seriously ill, that the general state of his health was good, that he was then in good health, and that he had not been nor then was subject to asthma, cough, pains in the chest, or any tendency to consumption or other pulmonary complaint; and the defendant in and by the said declaration then also declared and stated to the said company, that he made the said declaration as the basis of the said proposed insurance on the life of the said E. E., and that the said particulars and statements were true and correct, and that he had not omitted or concealed any fact material to be known to the assurers; and thereupon afterwards, to wit, on the —— day of —— A. D. ——, by a certain policy of assurance then made upon the faith of the said declaration as the basis thereof, and then duly signed by —— as and being three of the directors of the said company and for the said company; after reciting that the defendant was interested in the life of the said E. E., and was desirous of making an insurance thereon for the whole term thereof, and had subscribed or caused to be subscribed and delivered into the said office, a declaration as the basis of the said insurance, setting forth certain particulars and statements therein mentioned, being the declaration hereinbefore mentioned, and had paid to the trustees of the said company, at their office in Lombard Street in the city of London, the sum of £—— as a consideration for the assurance of the sum thereunder mentioned for one year from the —— day of —— A. D. ——, it was and is declared that in case the said E. E. should happen to die at any time within the said term of one year, the stock and funds of the company should be subject and liable to pay and make good to the defendant, his executors, administrators, or assigns, within three months after the demise of the said E. E. should have been duly certified to the said trustees aforesaid at their said office the sum of £—— of lawful money of Great Britain; and it was thereby further agreed, that the said policy might be continued in force from year to year until the expiration of the term of the life of the said E. E., provided the said assured should duly pay or cause to be paid to the said trustees, at their said office, on or before the —— day of —— then next ensuing, the sum of £——, and the like sum annually on or before the day aforesaid, which annual †payments should be accepted at every such period as a full consideration for such assurance; and in the said policy there was, amongst other things, contained a proviso, that should the said declaration turn out to be in any respect untrue, then the said policy, and every thing appertaining thereto, should cease, be void, and of none effect, and the premiums already paid should be retained by the said company; and the defendant then duly paid the said premium or sum of £—— to the said trustees for the said company, and the said assurance to the defendant of the said sum of £—— to the said trustees for the said company, and the said assurance to the defendant of the said sum of £—— upon the life of the said E. E. was thereupon completed, whereas in truth and in fact at the time of the making and sub-

scribing the said declaration, and delivering the same to the said office as aforesaid, and at the time of effecting the said policy, that declaration was false, untrue, and incorrect in this, to wit, that the said E. E. had before the time of the so making, subscribing and delivering such declaration been seriously ill, as the defendant at the time of so making, subscribing and delivering such declaration well knew; and also in this, to wit, that the general state of the health of the said E. E. was not then good, as the defendant then well knew; and also in this, to wit, that the said E. E. was not then in good health as the defendant then well knew, and also in this, to wit, that the said E. E. at the time of so making, subscribing and delivering the said declaration, had been and then was subject to asthma, cough, pains in the chest, and other tendency to consumption and pulmonary complaint, as the defendant then well knew; and whereas in truth and in fact the defendant made the said declaration in the particulars aforesaid falsely and fraudulently, and the said company were induced to make and enter into the said policy, and the said policy was effected with and obtained from the said company by the defendant, through and by means of the fraud and covin, misrepresentation, and concealment of the defendant in that behalf, by reason whereof the said policy then was void and of none effect, as the defendant well knew; yet the defendant well knowing the premises, but contriving and fraudulently intending to cheat, defraud, and injure the plaintiffs in this behalf, did afterwards and in the life-time of the said E. E., to wit, on [*&c.*] by a certain indenture made between the defendant of the first part, the said E. E. of the second part, and the plaintiffs of the third part, in consideration of the sum of £—— then paid to the defendant by the plaintiffs, fraudulently bargain, sell, assign, transfer, and set over unto the plaintiffs the said dividends and annual produce to which the defendant was so entitled and his said interest therein, and also the said policy of assurance so effected, without disclosing or making known to the plaintiffs or either of them the fraud so committed and practised on the said company, and by such concealment induced the plaintiffs to make such purchase and to take such assignment which they otherwise would not have done, and from the time of the said bargain, sale, and assignment fraudulently continued to retain the benefit resulting to him therefrom, and to conceal from the plaintiffs the said fraud on the said company until the said E. E. afterwards and within the term of one year from the said —— day of —— A. D. ——, to wit, on [*&c.*] died, during all which time the plaintiffs had not the means or opportunity of discovering, and did not discover, and were ignorant that the said fraud had been or was committed or practised on the said company, and were thereby induced to believe and suppose, and did during all that time believe and suppose that the said policy had been fairly obtained from the said company and was not liable to be impeached for any fraud, but was a good and sufficient security to them in that behalf; and the plaintiffs aver that by reason of the said fraud on the said company, and the falsehood of the said decla-

ration as aforesaid, and by reason of the said policy of assurance being void on account thereof, they the said company upon and after the death of the said E. E. did refuse, and thence hitherto have refused, and still do refuse to pay the said sum of £—— or any part thereof to the said plaintiffs or either of them, as they the said company otherwise might and would have done and would have been obliged to do, although the plaintiffs after the death of the said E. E., to wit, on the —— day of —— A. D. ——, and oftentimes afterwards before the commencement of this suit requested the said company to pay them the same; and by reason thereof the plaintiffs have wholly lost the benefit of the said policy and the said sum of £—— thereby intended to be insured, and have also necessarily incurred divers expenses, to wit, to the amount of £—— in investigating the circumstances attending the said fraud on the said company, and ascertaining the state of the health of the said E. E. at the time the said declaration was made and the said policy was effected and incidental thereto, and in endeavoring to obtain payment of the said sum of £—— from the said company and in relation thereto; and by reason of the several premises the plaintiffs have been and are otherwise injured; To the damage of the plaintiffs of £——, and therefore [*&c.*]

### 6. *Declaration in Case by the Purchaser of a Lease and Fixtures for a Fraudulent misrepresentation by the Vendor, that the latter were his Property, whereas they belonged to the Landlord, who claimed and took them at the end of the Lease.*

For that whereas before and at the time of the committing the grievance by the defendant as hereinafter mentioned, the defendant was possessed of a certain messuage under and by virtue of a certain lease thereof, for a certain term of years therein to come and unexpired; and the defendant was also possessed of certain fixtures, chattels and effects then being in and upon the said messuage with the appurtenants; and the defendant then represented to the plaintiff that he was entitled to sell and dispose of the fixtures and articles hereinafter mentioned and set forth, then being in and upon the said messuage with the appurtenants, and the defendant being †desirous of disposing of all his interest in the said messuage and of his interest therein and in the said term, to wit, on [*&c.*], wrongfully and injuriously contriving and intending to deceive, defraud and injure the plaintiff in this behalf, then falsely, fraudulently and deceitfully represented and asserted to the plaintiff that the fixtures and things hereinafter mentioned, then being in and upon the said messuage, to wit, [*&c. set them out*], and being of great value, to wit, of the value of £——, were the property of the defendant and that he was entitled to sell and dispose of the said lease of the said messuage with the appurtenants, and also of the said fixtures and articles hereinbefore mentioned to the plain-

tiff; whereupon heretofore, to wit, on the day and year aforesaid, the plaintiff, confiding in the said representations of the defendant, at the request of the defendant, bargained with him to buy of him the defendant's interest in the said unexpired term of the said lease of the said messuage with the appurtenants, together with certain fixtures and effects therein, and also the fixtures and articles hereinbefore particularly mentioned, at and for a certain sum of money, to wit, the sum of £—— then agreed upon between the plaintiff and the defendant; and the plaintiff then paid the said sum of money to the defendant for the same, whereas in truth and in fact the fixtures and articles hereinbefore in that behalf particularly described, were not the property of the defendant nor was he entitled to sell and dispose of the same to the plaintiff, as the defendant at the time of his making his said false and deceitful representations well knew; and the plaintiff further saith, that the defendant, by means of the premises, on the day and year aforesaid, falsely and fraudulently deceived the plaintiff on the said sale; and that afterwards and after the expiration of the said lease and of the interest of the plaintiff in the said premises, to wit, on [*&c.*] the plaintiff surrendered and yielded up the said messuage with the appurtenants, and was forced and obliged to surrender and yield up, and did then surrender and yield up the fixtures and articles hereinbefore in that behalf mentioned to E. F. then being the ground landlord of the said messuage, as and then being fixtures belonging to the freehold, and which could not be lawfully removed therefrom by the plaintiff, without receiving any compensation or value for the same; To the damage of the plaintiff of £——, and therefore he brings his suit, &c.

### 7. *Several Forms for falsely pretending to be Owner, &c. of Goods, or Agent, &c.*

[Form in case by an auctioneer against his employer upon the implied warranty of the latter, that he had authority to sell the goods put up by the plaintiff to auction, and showing that the true owner recovered the value against the plaintiff; Adamson *v.* Jarvis, 4 Bing. 66; 12 Moore, 241.

For falsely pretending to be the Principal, defendant being only Agent, and thereby inducing plaintiff to accept bills; Dyster *v.* Battye, 3 B. & Al. 448.

†Declaration in case for accepting a bill as agent of the drawee without his authority, *per quod* plaintiff sued the latter as acceptor and failed in his suit; Polhill *v.* Walter, 3 B. & Ad. 114.

Form (held good) for falsely pretending to a person, of whom plaintiff had bought goods, that defendant had a lien thereon and right to receive them, and thereby inducing such person to withhold the goods from plaintiff; Green *v.* Button, 2 C. M. & R. 707; 1 Tyr. & Gr. 118, S. C.

[†537]

For falsely pretending to have authority from plaintiff's debtor, then in custody, to make an arrangement for him, and thereby inducing plaintiff not to charge the debtor in execution; Hewitt *v.* Melton, 1 C. M. & R. 232.

Declaration at the suit of a sheriff against the plaintiff in a former suit, for falsely representing that certain goods belonged to the defendant in such former suit, and thereby inducing sheriff to seize them in execution, whereby he was sued, &c. by the real owner &c.: declaration held good by the House of Lords, although it contained no averment of fraud or knowledge of falsity on the part of defendant, upon motion in arrest of judgment; Humphreys *v.* Pratt, 5 Bligh, N. S. 154.]

## 8. *For false Representations as to the Character and Circumstances of third Persons.* (*x*)

[For inducing the plaintiff to supply a third person with goods, by a fraudulent misrepresentation of his circumstances, see Form, &c. Corbett *v.* Brown, 8 Bing. 33; 1 M. & Sc. 85, S. C.; see Forms Pasley *v.* Freeman, 3 T. R. 51; Eyre *v.* Dunsford, 1 East, 318; Haycraft *v.* Creasy, 2 *id.* 92; 2 Chit. Pl. 5th ed. 702, 6th ed. 490 to 494. Declaration for inducing the plaintiff to employ an agent not trustworthy; Forster *v.* Charles, 6 Bing. 396; 7 Bing. 105; 4 M. & P. 741, S. C.; S. P. in 2 Chit. Pl. 6th ed. 492 (*x*).]

(*x*) An action on the case lies at common law for a *false* representation as to the character, credit, or circumstances of another person, in order that he may obtain credit, &c., provided the party making the representation *knew* it was untrue, and the party to whom it was made relied upon the representation and sustained an injury by trusting the person recommended; Pasley *v.* Freeman, 3 T. R. 51; Cases *supra*, Form 8; and 1 Har. Ind. tit. "Case—Deceit," 569. In such case it is not necessary to prove that the defendant was actuated by direct malice against the plaintiff, or anticipated any pecuniary advantage to himself; see Forster *v.* Charles, 6 Bing. 396; 7 Bing. 105; 4 M. & P. 741, S. C. As to the nature of the credit given and injury resulting in consequence of the representation, in order to fix the party making the representation, see Corbett *v.* Brown, *supra*; De Graves *v.* Smith, 2 Camp. 533; Hutchinson *v.* Bell, 1 Taunt. 558. By Lord Tenterden's Act, 9 G. 4, c. 6, it is provided, that "no action shall be brought to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the conduct, credit, trade, ability, or dealing of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in *writing, signed by the party to be charged therewith.*" (The memorandum need not be stamped, sec. 8.) In Lyde *v.* Barnard, 1 Tyr. & G. 250; 1 M. & W. 101, S. C., the Court were equally divided in opinion in regard to the true construction of the word *ability* in this enactment; two of the judges, Lord Abinger and Gurney B., thinking it applied to a misrepresentation of the incumbrances upon the interest of a third person in certain funds, proposed to be transferred by him to the plaintiff as a security for the payment of an annuity to be granted to him; and Parke B. and Alderson B. being of opinion that it did not apply to such case. It is observable that the statute renders the signature of an agent insufficient; see Hyde *v.* Johnson, 2 Bingh. N. C. 776. The declaration need not show that the representation was in writing; see 1 Saund. 276, note (1); *ante*, 115. The third person respecting whom the representation is made is a competent witness for the plaintiff; Richardson *v.* Smith, 1 Camp. 277; Smith *v.* Harris, 3 Stark. R. 47; Beal *v.* Thatcher, R. & M. 48.

†9. *For Imitating the Labels put on the Reels on which a Cotton Merchant or Thread Winder, &c. wound his Thread for the purposes of Sale.* (*y*)

For that whereas long before and at the time of the committing of the grievances by the defendant hereinafter mentioned, the plaintiff exercised and carried on, and still doth exercise and carry on, the business of a cotton merchant; and in the way of his said business the plaintiff wound, prepared, got up and sold, and still doth wind, prepare, get up and sell amongst other goods, certain thread of a superior quality and description, and wound, prepared and got up in a superior manner. And whereas before the committing of the grievances by the defendant hereinafter mentioned, to wit, on [*&c.*] the plaintiff had at a considerable expense caused to be prepared, engraved and printed and made certain labels or papers, to be stuck upon and attached or affixed to the reels upon which the said thread was wound and kept and sold, and to the packages in which the said thread was usually offered for sale and sold by the plaintiff, such labels or papers being of a particular form, shape and appearance, and having thereon the words "——," in order to denote that the said thread was wound, prepared and got up by the plaintiff, and to distinguish it from all thread wound, prepared or got up by other persons; and whereas before and at the times of the committing of the grievances next mentioned, the plaintiff called his said thread —— thread, and the same was commonly known by that title or name, and the plaintiff was used and accustomed to use such labels or papers upon such reels or packages as aforesaid; and whereas the plaintiff enjoyed great reputation with the public on account of the good winding, preparing and getting up of his said thread and sold large quantities of the same, whereby the plaintiff before and until the times of committing the grievances next mentioned had acquired and was acquiring great gains and profits; yet the defendant, well knowing the several premises, but wickedly and wrongfully, subtly and unjustly intending to injure the plaintiff in his said sale of the said thread, and to deprive him of the great gains and profits which he the said plaintiff otherwise might and would have acquired by †winding, preparing, getting up and selling the said thread as aforesaid, heretofore, to wit, on [*&c.*] and on divers other days and times between that day and the commencement of this suit, wrongfully, knowingly, injuriously, deceitfully and fraudulently, against the will and without the license or consent of the said

(*y*) See other forms and the law upon this subject in Sykes *v.* Sykes, 3 B. & C. 541; 5 D. & R. 292, S. C.: Blofield *v* Payne, 1 N. & M. 353; 4 B. & Ad. 410, S. C.; 2 Chit. Pl. 6th ed. 487; 1 Harr. Ind. 572, tit. "Case—Deceit." Who to sue for the imitation; Singleton *v.* Bolton, 3 Dougl. 293; Delondre *v.* Shaw, 2 Sim. 237. In the case of a *patent* article a penalty of 50*l.* (half to the Crown and the other moiety to the informer suing for the same) is inflicted upon any person using, without consent, the name or marks, &c. of the patentee; 5 & 6 Will. 4, c. 83, s. 7, Chit. & Hulme Col. Stat. 789.

plaintiff, prepared and made, and caused to be prepared and made certain other labels or papers intended to represent and in imitation of and similar in appearance to the said labels of the plaintiff; and then wrongfully and injuriously, knowingly, deceitfully and fraudulently, and without the plaintiff's consent, offered for sale and sold and disposed of divers, to wit, 500,000 reels of thread, and 500,000 pakages of thread not wound, prepared, got up, or sold by the plaintiff with such labels or papers so prepared and made by the defendant stuck upon, and attached, and affixed to the reels or packages of thread so sold by the defendant respectively, in order to denote that such thread was the genuine thread called —— thread, so wound, prepared, got up and sold by the plaintiff as aforesaid, and then wrongfully, knowingly and fraudulently sold the said reels of thread and packages of thread, with such labels or papers of the defendant thereon, under the false color and pretence that the same were the thread so wound, prepared, got up and sold by the said plaintiff as aforesaid. (z) By reason of which said premises the said plaintiff has been and is fraudulently, deceitfully, wrongfully and injuriously hindered and prevented by the defendant from selling and disposing of divers large quantities, to wit, —— reels and —— packages of his said thread, of great value, to wit, of the value of £——, which the plaintiff would otherwise have sold and disposed of, and hath been and is deprived of divers great gains and profits which would otherwise have accrued to him from the sale thereof, and also by means of the premises, divers persons have been and are induced to believe, and do suppose that the said thread, so sold by the defendant as aforesaid, was and is the said thread called —— thread, wound and sold by the plaintiff as aforesaid, whereby the fame, credit and reputation of the plaintiff have been and are much prejudiced and deteriorated; and also by means of the premises the plaintiff hath been much injured and damnified in his said business and otherwise; To the plaintiff's damage of £——, and therefore he brings his suit, &c.

## GOODS.

See "Reversion."

## HIRER.

See "Bailees."

(z) See Sykes *v.* Sykes and other cases, *supra*; Canham *v.* Jones, 2 Ves. & B. 218.

†HOUSES.

See "Nuisances."

HUNDRED.

*Declaration in Case on 7 & 8 Geo. 4, c. 31, against the Hundred, to recover compensation for Damage done to Plaintiff's House, &c. by Rioters.*

[See Form, &c. 2 Chit. Pl. 5th ed. 828, 6th ed. 592; Lowe *v.* Broxtowe, 3 B. & Ad. 550; Newcastle *v.* Broxtowe, 4 B. & Ad. 273; see Till Adam *v.* Bristol, 4 N. & M. 144; 2 Ad. & E. 389; Rex *v.* Bateman, 1 N. & M. 718.

The writ may be served on the constable, 2 W. 4, c. 39, s. 13.

As to Thrashing Machines, see 2 & 3 W. 4, c. 72. See *Pleas, post*, "Hundred."]

HUSBAND AND WIFE.

*For Criminal Conversation.* (*a*)

For that whereas the defendant, contriving and wrongfully, wickedly and unjustly intending to injure the plaintiff, and to deprive him of the comfort, fellowship, society, aid and assistance of E. [*the wife's christian name*] the wife of the plaintiff, and to alienate and destroy her affection for the plaintiff, heretofore, to wit, on the —— day of —— A. D. ——, [*the day, or about the day the first act of adultery can be proved*], and on divers other days and times after that day and before the commencement of this suit, wrongfully, wickedly and unjustly debauched and carnally knew the said E. then and still being the wife of the plaintiff, and thereby the affection of the said E. for the plaintiff was then alienated and destroyed; and also by means of the premises the plaintiff hath thence hitherto wholly lost and been deprived of the comfort, fellowship and society of his said wife, and of her aid and assistance in his domestic af-

(*a*) See Form, 2 Chit. Pl. 5th ed. 642, 6th ed. 453. Trespass also lies, and seems to be the usual form of action; see form, *post, in Trespass, and notes there.* Case is the best form of action where there is a doubt whether the adultery can be proved, and there is a ground of action for enticing away or harboring the wife without the husband's consent, because under such circumstances there may be a second count for the latter grievance; see form of such count, Winsmore *v.* Greenbank, Willes, 578; see further *post*, Pleas, "Husband and Wife."

fairs, which the plaintiff during all that time ought to have had, and otherwise might and would have had; To the damage of the plaintiff of £——, and therefore he brings his suit, &c.

## †INDEMNITY.

See "Landlord."

## INNKEEPERS.

[Declaration against an innkeeper at the suit of a guest for the loss of his goods; Jones *v.* Tyler, 1 Ad. & El. 522; 3 N. & M. 576; 2 Chit. Pl. 5th ed. 667, 6th ed. 467. See the law on this subject, *id.* and Kent *v.* Shuckard, 2 B. & Ad. 803; Doorman *v.* Jenkins, 4 N. & M. 170; Harr. Ind. and Add. tit. "Innkeeper;" Chit. jun. Contr. 2d ed. 378. Hotel-keeper; Jones *v.* Osborne, 2 Chit. R. 484; Thompson *v.* Lacy, 3 B. & Al. 283. Declaration against an innkeeper for refusing to receive a traveller; 2 Chit. Pl. 5th ed. 668, 6th ed. 468; Elsee *v.* Gatward, 5 T. R. 143. Indictment lies for such refusal; R. *v.* Ivers, 7 C. & P. 213; 6 M. & Sel. 393, per Holroyd, J. See *Pleas, post*, "Innkeepers."]

## INVENTION.

See "Copyright," "Fraud," "Patent."

## LANDLORD AND TENANT.

See "Distresses," "Reversion."

1. *Case by a Landlord against his Tenant (or a Stranger) for Voluntary Waste, by injuring the Premises, and taking down and removing the Plaintiff's Fixtures.* (*a*)

For that whereas before and at the times of the committing of the

(*a*) See a special form, Martyr *v.* Bradley, 9 Bing. 26; 2 M. & Scott, 25, S. C.; and other forms in the cases *infra*. Case lies by a landlord against his tenant or a stranger for voluntary waste committed during the tenancy, or by a party entitled

grievances †by the defendant as hereinafter mentioned, a certain messuage or dwelling-house, situate in the county aforesaid, was in the possession of the defendant [*or*, "of one E. F."] as tenant thereof to the plaintiff, (*b*) the reversion thereof then (*c*) belonging to the plaintiff; yet the defendant, well knowing the premises, but contriving wrongfully and unjustly intending to injure, prejudice and aggrieve the plaintiff in his reversionary estate and interest of and in the said dwelling-house, with the appurtenants, heretofore, and whilst the said messuage or dwelling-house was so in the possession of the defendant [*or*, "the said E. F."] as such tenant thereof to the plaintiff, and whilst the plaintiff was so interested therein, to wit, on the —— day of —— A. D. ——, and on divers other days and times between that day and the —— day of —— A. D. ——, wrongfully and unjustly, without the leave and against the will of the plaintiff, pulled down, broke down, broke to pieces, prostrated, damaged and destroyed divers parts of the said messuage or dwelling-house, to wit, two walls, two partitions, two ceilings, two doors, fifty panes of glass [*&c.*] parcel thereof (*d*), [and used the said dwelling-house in so bad, untenantlike and improper a manner, that the same, by and through the improper conduct of the defendant in the premises, then and there became and was greatly dilapidated, broken down, broken to pieces and damaged (*e*).] And also during the said tenancy, to wit, on

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to the *immediate* reversion against the tenant for life, &c.; see 1 Saund. 323 b; 2 Saund. 252, b, c, &c.; 2 Stark. Ev. "Waste." In the instance of a tenant *neglecting* to keep the premises in repair, or to cultivate according to good husbandry, *assumpsit* is the usual, and would seem to be the more appropriate remedy; see forms, *ante*, 139 to 144; see however form, 2 Chit. Pl. 5th ed. 785 c, 6th ed. 555. It has been held that case for *permissive* waste does not lie against a tenant from year to year; Gibson *v.* Wells, 1 New R. 290; or a tenant for a term not under a covenant to repair; Herne *v.* Bembow, 4 Taunt. 764. Case for *commissive* or *voluntary waste* lies against a tenant, although he hold under a lease with a covenant to repair; Kenlyside *v.* Thornton, 2 Bla. R. 1111; 2 Saund. 252 a, b, note; or commit waste whilst holding over after notice to quit; Burchell *v.* Hornsby, 1 Camp. 360; but it is not the proper form of action merely for not repairing, &c. where there is a covenant to leave the premises in such repair as plaintiff should put them into, for such omission cannot be called *waste*; Jones *v.* Hill, 7 Taunt. 392; 1 Moore, 100, S. C.; Burnett *v.* Lynch, 5 B. & C. 603. Case for inclosing waste land, part of the premises demised; Queen's College, Oxford, *v.* Hallett, 14 East, 489. For opening door in a wall demised, and see points as to form of declaration, &c., Young *v.* Spencer, 10 B. & C. 145; 5 M. & R. 47. By an incoming against an outgoing tenant on the custom of the country for not leaving a third of the off-going crop, &c.; Boraston *v.* Green, 16 East, 71.

(*b*) No variance, though cestui que trust actually let, but plaintiff was his trustee with the legal title; Valance *v.* Savage, 7 Bing. 595; 2 M. & P. 576. If there be a written agreement, *semble*, it must be produced, if the tenancy be denied by the plea; see *Pleas*, *post*, "Landlord;" 4 B. & C. 465; 5 Bing. 136.

(*c*) It is not a material variance to allege contrary to the fact, that the tenancy and reversion still continue; Vowles *v.* Miller, 3 Taunt. 137.

(*d*) The nature or kind of waste should be stated according to the facts; see 2 Saund. 252 d, e, f; Forms, in Trespass *post*. For cutting trees; 2 Chit. Pl. 5th ed. 785, 6th ed. 546, 553. Where trees are excepted from the demise, *Trespass*, and not case, for cutting them, is the proper form of action for the landlord; Goodright *v.* Vivian, 8 East, 190; 1 Saund. 322, note 5; Ward *v.* Andrews, 2 Chit. R. 636; 2 Camp. 491. Whether the trees be excepted or not, the landlord may in general maintain trespass or trover against a person who removes them after severance; *id.* When otherwise, see Channon *v.* Patch, 5 B. & C. 897; 8 D. & R. 651, S. C.

(*e*) Omit the allegation between the brackets if the action be against a stranger, not against the tenant.

the several days and times aforesaid, wrongfully and injuriously pulled down, detached and removed from the said messuage or house divers fixtures and things, to wit, [two ovens, two stoves, *&c.*] of great value, to wit, of the value of £——, then being in the said messuage or dwelling-house, and affixed and annexed thereto and parcel thereof, and being of great value, to wit, of the value of £——, and converted and disposed of the same to the defendant's use, whereby the plaintiff was greatly injured, prejudiced and aggrieved in his reversionary estate and interest (*f*) of and in the said messuage or dwelling-house with the appurtenants and of and in the said fixtures and things so in the possession and occupation of the defendant [*or* "the said E. F."] as tenant thereof to the plaintiff as aforesaid. [And the †plaintiff further saith, that at the end of the said tenancy, to wit, on the said —— day of ——, A. D. ——, the defendant yielded and delivered up to the plaintiff the said messuage or dwelling-house so damaged and dilapidated as aforesaid (*g*); To the damage of the plaintiff of £——, and thereupon he brings his suit, &c.

## 2. *Case by a Landlord against his Tenant for not taking care of the Furniture, &c.*

[State that "the defendant became and was tenant to the plaintiff of a certain house, with certain fixtures and furniture of the plaintiff therein, at a rent, &c.; the said fixtures, &c. to be used by the defendant as tenant during the term," and then charge his *duty* to take due care, &c. during the term; that the term continued and defendant had the use, &c.; yet that he did not take due care, &c. during the term; whereby during the term, to wit, on &c. certain of the said fixtures, &c. to wit, &c. became injured, &c. See Forms, *ante*, 121, 502.]

## 3. *Case by a Tenant against his Landlord for not indemnifying him against a Distress for Ground Rent.*

[See Form, &c. Hancock *v.* Caffyn, 8 Bing. 358; 1 M. & Sc. 521, S. C.; 2 Chit. Pl. 5th ed. 727; Form in *assumpsit*, *id.* 314, 6th ed. 195. Case seems to be the appropriate form of action; and see per Cur. in Burnett *v.* Lynch, 5 B. & C. 609. The common count in assumpsit or debt for money paid for defendant at his request, would lie where the plaintiff has paid the arrears to prevent a sale, otherwise not; and to recover damages for a sale under a distress, &c. or expenses, the declara-

(*f*) As to the necessity for this allegation, see *post*, tit. "Reversion;" Jackson *v.* Pesked, 1 M. & Sel. 234; Baxter *v.* Taylor, 4 B. & Ad. 72; 1 N. & M. 14; Young *v.* Spencer, 10 B. & C. 145; 5 M. & R. 47.

(*g*) Omit this allegation if the tenancy was not at an end when the action was brought, or the action be against a stranger, not against the tenant.

tion must be special; Exall *v.* Partridge, 8 T. R. 308; Moore *v.* Pyrke, 11 East, 52.]

4. *By the Assignor against the Assignee of a Lease for not indemnifying him against the Breaches of Covenant after the Assignment.*

[See Form, &c. Burnett *v.* Lynch, 5 B. & C. 589; 8 D. & R. 368, S. C. *Assumpsit* also would, it seems, be sustainable. *Covenant* does not lie where the assignee does not execute the assignment, or it contains no covenant by him to pay the rent and perform the covenants: and the usual words of assignment, "subject to the rent," &c. do not constitute a covenant by the assignee; see Wolveridge *v.* Steward, 1 C. & M. 644; 4 M. & Sc. 249, S. C.]

†5. *Declaration in Case by a Tenant, not bound to repair, against his Landlord, who had commenced doing Repairs to the Premises, for not proceeding with the Repairs in a proper manner.*

For that whereas before and at the time of the committing of the grievances hereinafter mentioned, the plaintiff was tenant to the defendant of a certain messuage, to wit, for one year, and so on from year to year, for so long a time as the plaintiff and defendant should respectively please; and the said messuage was seriously dilapidated and much out of repair and was in part not fit for occupation; and the defendant had thereupon, with the plaintiff's permission, to wit, on [*&c.*] entered upon and in part performed, and had in progress, certain repairs necessary and proper to be done to and in the said messuage upon that occasion, and which the plaintiff was not bound or under any legal or just obligation to do or perform, and thereupon it then became and was the defendant's duty, having so entered upon the said repairs, to use due care, skill and diligence in performing, proceeding with, and completing the same, so that the plaintiff might not sustain any unnecessary damage or injury in regard to his use and occupation and enjoyment of the said messuage as such tenant, by reason of the said repairs being left unfinished or incomplete during an unreasonable time; yet the defendant, not regarding his duty in that behalf, did not, nor would use due care, skill or diligence in performing, proceeding with, or completing the said repairs, so that the plaintiff might not sustain unnecessary damage and injury in regard to his use, occupation and enjoyment of the said messuage as such tenant; but on the contrary thereof, then and for a long time, to wit, until the commencement of this suit, wrongfully neglected and refused so to do, and by reason thereof, and of the carelessness, unskilfulness and improper conduct and default of the defendant in that behalf, the said messuage

became and was greatly and unnecessarily injured and damaged, and the said repairs were not proceeded with, done, or performed within a reasonable time, although such time hath long since elapsed; and thereby the plaintiff was put to great and unnecessary inconvenience and loss in regard to his use, occupation and enjoyment of the said messuage, and was during the said time deprived of the use of a great part thereof, and then incurred a great expense, to wit, £10, in repairing the said messuage, which would not have been necessary had the defendant performed his said duty; and the plaintiff by reason of the committing of the said grievances was and is otherwise injured.

### 6. *By a Lodger against his Landlord for obstructing him in the use of the Bell, &c.*

[See Form, &c. Underwood *v.* Burrows, 7 C. & P. 26.]

1st. LIBELS. (*k*)

### †1. *General form of Declaration for a Libel directly charging an Offence, &c. and not requiring Explanation by a Special Inducement.*

For that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, was a person of good name, credit, and reputation, and deservedly en-

(*k*) See in general Com. Dig. and Bac. Ab. "Libels;" Viner's Ab. "Slander;" 3 Bla. C. 124; Starkie on Slander; Selw. N. P. tit. "Libel, Slander;" Stark. and Phillips Ev. tit. "Libel;" Harrison's Ind. tit. "Defamation;" Roscoe's Ev. 4th ed. 362; 1 Chit. Gen. Pr. 43; *and the notes to the various Forms infra.* The following precedents are arranged in reference to the several instances in which libels or verbal slander are considered actionable. The main point to be regarded in framing a declaration for a libel or slander are 1st. The *inducement*, or prefatory statement of *introductory matter* (*post*, 549, n.(*y*)); 2dly. The *colloquium* or statement that the defamation had reference to the plaintiff, and (sometimes) to the introductory matter, (*post*, 546, note (*r*)); 3dly. The *publication*, (*infra*, note (*q*)); 4thly. The statement of the *scandalous matter* itself, (*post* 546, note (*s*)); 5thly. The *innuendoes*, (*post*, 547, n. (*t*)), and 6thly. The *damage*, (*post*, 548 note (*z*), and *post*, 561). See in general 1 Chit. Pl. 5th ed. 429 to 438; 6th ed. 399 to 408; Stark. on Slander, Ind. tit. "Declaration." *Costs*:—By 21 Jac. 1, c. 16, s. 6, "In all actions for slanderous words, if the jury, either upon trial or writ of inquiry, shall find or assess damages under 40*s.*, the plaintiff shall only recover the same amount of costs as the damages given." The statute does not extend to an action for a *libel*, (but the judge may in such action certify under 43 Eliz. c. 6, to deprive the plaintiff of costs); nor to an action for words not *in themselves* actionable, and only rendered so by special damage charged therein. But it extends to actions for slander of the plaintiff in his trade; and the laying special damages, where not *necessary* to maintain the action, will not in any action entitle the plaintiff to full costs, if the damages be under 40*s.*; and in the actions to which the statute extends, the plaintiff, he recovering less than 40*s.* damages, does not become entitled to his costs, because the defendant justified the slander; see Tidd, 9th ed. 962; Tidd, N. P. 530; Chit. Arch, 5th ed. 1001; 1 Harr. Ind. 2d ed. tit. Costs, 671; *id.* Addenda, 2407.

joyed the esteem and good opinion of divers persons.(*i*). Yet the defendant, well knowing the premises, but combining and wickedly and maliciously(*k*) intending to injure the plaintiff, and to bring him into public scandal and disgrace,(*l*) heretofore, to wit, on the —— day of —— A. D. ——, (*m*) falsely, (*n*) wickedly, and maliciously (*o*) did compose (*p*) and publish, (*q*) and †cause to be composed and published of and concerning the plaintiff, (*r*) a certain false, scandalous, malicious, and defamatory li-

(*i*) An inducement of the plaintiff's general good character, and an express allegation of his innocence of the offence imputed to him, are usually introduced with considerable prolixity in the declaration; but these statements are clearly unnecessary; Strachy's *case*, Styles, 118; Jones *v.* Stevens, 11 Price, 235; 1 Stark. Sla. 2d ed. 537; 1 Chit. Pl. 6th ed. 400. Plaintiff not allowed to prove general good character: Stuart *v.* Lovell, 2 Stark. R. 43; Cornwall *v.* Richardson, Ry. & Mo. 305. For the sake of conciseness, the above form is suggested. As to *special* inducements, see Form 2.

(*k*) As to *malice*, see *infra*, note (*o*).

(*l*) This concise allegation is sufficient, and appears to be preferable to the usual prolix statement of the plaintiff's happy condition, and of defendant's envy and malevolent intentions.

(*m*) Exact day not material; words spoken at different times may be given in evidence on one count; Charlter *v.* Barret, Peak, R. 22.

(*n*) The libel or words must be *false*, and the declaration always charges their falsity, but probably the word wrongfully or maliciously would be sufficient, at least if there were no demurrer; see 1 Saund. 242 a, note 2; 1 Stark. Sla. 2d ed. 433; Rowe *v.* Hoar, 1 M. & Sel. 304.

(*o*) The charge must be malicious in fact or in law, but it seems that any equivalent expressions, as "wrongully and falsely," &c. published, &c., would suffice; 1 Saund. 242 a, note 2; 1 Stark. Sla. 2d ed. 433. See *post*, 563, notes (*d*) and (*f*). The malice is implied from the falsity. Proof of express malice; Rosc. Ev. 4th ed. 372; 2 Stark. Ev. 461.

(*p*) If there be any doubt whether the defendant was the author, omit this; but under the allegation in the text proof of publication only would sustain the action.

(*q*) See 1 Saund. 242 n, 1; 1 Stark. Sla. 2d ed. 358, 411; 1 Chit. Pl. 6th ed. 406. Evidence of publication, Phil. Ev. 7th ed. 236; Rosc. 4th ed. 364; 2 Stark. Ev. 2d ed. 454. Although the plea admits the publication, the plaintiff may prove the manner of the publication with a view to the amount of damages; Vines *v.* Serell, 7 C. & P. 163.

(*r*) A *colloquium*, or statement that the libel was composed and published, or the words were spoken and published "of and concerning the plaintiff," is essential, although it be averred that defendant published "with intent" to impute the offence, &c. to the plaintiff; see 1 Saund. 242 b. n. 3; 1 Stark. Sla. 2d ed. 383, 416; 1 Chit. Pl. 6th ed. 403. And a declaration which stated that defendant published a libel, containing the false and scandalous matter following, without alleging that such matter was "of and concerning the plaintiff," and then set out the libel, which did not on the face of it relate to the plaintiff, and did not connect him with it by innuendo, was held bad on a writ of error; Clement *v.* Fisher, in error, 7 B. & C. 459; 1 M. & R. 281, S. C. So where there is necessarily a special inducement of extrinsic facts to render the libel for words actionable, see *post*, 549, n. (*y*), there must *also* be a colloquium that the libel or words were published "of and concerning" the matters in the inducement, (as "of and concerning the felony," or "fire," &c. *or* "of or concerning the plaintiff in his said trade," &c., *or* generally "of and concerning the matters aforesaid.") 1 Saund. 242 b, n. 3; 1 Stark. Sla. 2d ed. 383; 1 Chit. Pl. 6th ed. 403; Rosc. Ev. 4th ed. 368. Where several matters are stated in the inducement, and it is alleged that the scandal was published "of and concerning the matters aforesaid," there will be no variance although some of the introductory matters be not proved, or be not proved precisely as laid, provided such of them as are not established do not bear essentially upon the libel or slander, and affect its character, and enough be left to render it actionable: the allegations may often be taken distributively; see May *v.* Brown, 3 B. & C. 113; 4 D. & R. 670; Cox *v.* Thomason, 2 C. & J. 362; 2 Tyr. 411, S. C.; 1 Chit. Pl. 6th ed. 401 to 403; Rosc. Ev. 4th ed. 368. Inducement and colloquium of two trades; proof of one only to which the words related, held sufficient; see *id.* Figgins *v.* Cogswell, 3 M. & Sel. 369; cited and approved of by Tindal, C. J. in Chalmers *v.* Shackle, 6 C. & P. 477; Rutherford *v.* Evans, 6 Bing. 451; Hall *v.* Smith, 1 M. & Sel. 287. But the *innuendo* sometimes binds the plaintiff to proof of both the trades; see Sellers *v.* Till, 4 B. & C. 656, *post*, 547, note (*t*). Where the actionable words are

bel, containing (amongst other things) the false scandalous, malicious, defamatory, and libellous matters following of and concerning the plaintiff,(*r*) that is to say, (*s*) †" He (meaning the plaintiff)(*t*) [*&c. setting out*

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stated to have been spoken *to* a plaintiff, "*you* are" &c. it seems to be sufficient to lay a colloquium or discourse *with* him, without an express averment that the words were spoken "of and concerning him." If the slander be laid in the third person "*he* is" &c. the words "of and concerning the plaintiff," are necessary, although there be the colloquium and an innuendo, otherwise the declaration is specially demurrable; 1 Chitty Pl. 6th ed. 404. If there be also no colloquium, the declaration is substantially bad; see *supra*.

(*r*) See *supra*, n. (*r*).

(*s*) It is a rule that in an action for defamation, the *libel or verbal slander* must be set out *in hæc verba*. The very words must be stated in order that the Court may see that the charge be actionable as a libel or slander. "If it were sufficient to state merely the effect of the words, any person would be at *liberty* to *swear* as to the *effect* of the words, without stating any precise words; and even if the witness did state precise words, the *jury* would have to judge of their *legal* effect, whereas that is generally to be decided by the Court. Words innocent in themselves might by the witness be perverted from their true meaning, or be by the jury so interpreted as to make a defendant clearly liable at law. It is not expedient to blend questions of law and fact together; the most useful object of all systems of pleading is to separate them; it ought therefore to appear to the Court upon the face of the declaration by the words or signs themselves, that they are sufficient to support such innuendoes or averments as may be necessary to apply to the subject; that they may bear the interpretation put on them, and present the injury which is charged to have resulted from them;" *per* Lord Abinger C. B. in Gutsole *v.* Mathers, 1 M. & W. 495. Therefore, in that case, although the words were actionable only in respect of special damage, the Court arrested the judgment after verdict, because the declaration only charged that defendant "falsely and maliciously *asserted and represented* in the presence [*&c.*] that the tulips were stolen property." A declaration is also bad if it state that the defendant published libellous matters "in *substance* as follows," setting out the libel, Wright *v.* Clements, 3 B. & Al. 503; or "*purporting*" that &c. Wood *v.* Brown, 1 Marsh. R. 522; 6 Taunt. 169. So a declaration for slander, that defendant falsely and maliciously "charged and *asserted* and *accused* plaintiff of being in insolvent circumstances," is bad; Cook *v.* Cox, 3 M. & Sel. 110. See Blizard *v.* Kelly, 2 B. & C. 283. The following variances have been holden material and fatal:—"mismanagement or ignorance," instead of "ignorance or inattention," Brooks *v.* *v.* Blanchard, 1 C. & M. 779; 3 Tyr. 844, S. C.; "my sarcastic friend by leaving out the repetition," instead of "my sarcastic friend ΜΩΡΟΣ, by leaving out, &c." Tabart *v.* Tipper, 1 Camp. 353. And if the matter be set out as a charge *of the defendant*, whereas the libel shows it is the original charge of another, who is referred to, the variance is material; Cartwright *v.* Wright, 5 B. & Al. 615; M'Pherson *v.* Daniels, 10 B. & C. 274 See further *post*, 556, n. (*t*), as to *slander*. But in general a mere omission of a word affecting the sense, will not prejudice; Tabart *v.* Tipper, *supra;* Beech's case, 1 Leach, 139; Rosc. Ev. 363, 364, 4th ed.; 1 Chit. Pl. 6th ed. 405. Instance of material omission, Cooke *v.* Smith, M'Clel. 250. As to setting out part of a sentence, Rutherford *v.* Evans, 6 Bing. 451; 4 M. & P. 163; 4 C. & P. 74. As to setting out continuously, sentences which are divided by others in the libel, see 1 Stark. Sla. 2d ed. 380; 2 Chit. Pl. 6th ed. 435, note (*s*). Verdict as to part of libel, the rest disproved, *post*, 548, note (*t*). A libel in a foreign language should be set out in that language, Zenobio *v.* Axtell, 6 T. R. 162; 1 Stark. 2d ed. 360; 1 Saund. 242 a, note; 1 Chit. Pl. 6th ed. 406. It is usual and proper to add a translation of foreign scandal; *post*, 557, note (*t*).

(*t*) This is called an *innuendo;* it is merely a form or mode of introducing *explanation;* it means no more than the words "*id est*" "*scilicet*," or "meaning," or "aforesaid," as explanatory of a subject matter sufficiently expressed before; as such a one, "meaning the defendant," or such a subject, "meaning" the subject in question; Rex *v.* Horn, 2 Cowp. 683, *per* De Grey, C. J. It is insufficient of itself for a *new* matter or a *new* charge; it can only introduce or embody such new matter or new charge by reference to a prior inducement; 1 Saund. 243, note 4; 1 Chit. Pl. 6th ed. 407; Day *v.* Robinson, 1 Ad. & E. 554. It is only legitimately used where it *applies* or explains what is already expressed; for instance, there is a colloquium or allegation, that the words were spoken "of and concerning the plaintiff," see *supra*, note (*r*); then the scandal is stated, and the innuendo applies it as above to the plaintiff; or there is an *inducement* of special matter (*post*, 549) with a colloquium "of and concerning such mat-

*the libellous matter in hæc verba, see supra, note (s).*] [SECOND COUNT FOR

ter," and then after stating the libel or words, the innuendo shows the particular meaning thereof as applied to such special matter; see Form 2, *infra*, 549 The innuendo is bad and renders the declaration defective, if it introduce *new* matter, or alter or enlarge the sense of the libel or words set out, without a special inducement and a colloquium concerning it, to support such innuendo; 1 Stark. 8la. 418, 2d ed.; 1 Saund. 243, n. 4; 1 Chit. 6th ed. 407; Hall *v.* Blandy, 1 Y. & J. 480. Thus a declaration not showing by a proper allegation that words were spoken concerning a suit pending, in which the plaintiff was a witness, and charging that defendant said "he is *forsworn*," "meaning that the plaintiff had committed *perjury*," is bad; Hawkes *v.* Hawkey, 8 East, 427; Holt *v.* Scholefield, 6 T. R. 691. "You (the plaintiff) are a regular prover under bankruptcies (*meaning* that plaintiff was accustomed to prove fictitious debts under commissions of bankrupt,)" bad; the innuendo not being supported by an inducement that the words had been so before used, &c. Alexander *v.* Angle, 1 Tyr. 9; 1 C. & J. 143; 7 Bing. 119; 4 M. & P. 870. Instance as to innuendo, &c. in an action for imputing that plaintiff set fire to his own barn, &c. Sweetapple *v.* Jesse, 5 B. & Ad. 27; 2 N. & M. 36; West *v.* Smith, 4 Dowl. P. C. 703. So where a declaration set out this libel, "Society of guardians for the protection of trade against swindlers and sharpers, &c. I (meaning defendant) am directed to inform you that A. B. (plaintiff) is reported to the society as improper to be proposed to be balloted for as a member thereof," "thereby meaning that plaintiff was a swindler and sharper, and an improper person to be a member of the said society:"—Held, in arrest of judgment, that the innuendo could not be supported without a previous averment, that it was the *custom of the society* to designate swindlers and sharpers *by the terms "improper persons to be members"* of that society; and that it did not appear that the society described in the libel was the society described in the introductory part of the declaration, and that the defect was not cured by verdict; Goldstein *v.* Foss, (in error), 2 Y. & J. 146; 4 Bing. 489; 1 M. & P. 402; 6 B. & C. 154; 2 C. & P. 252. But when written or printed matter *in itself* imports a libel on the plaintiff, no statement of extrinsic circumstances by way of inducement is necessary, and an innuendo improperly enlarging the sense will be rejected as surplusage; Day *v.* Robinson, 1 Ad. & E. 558. Thus in Harvey *v.* French, (in error), 2 Tyr. 585; 1 C. & M. 11; 2 M. & Scott, 591, the declaration stated that the defendant published of and concerning the plaintiff the false, &c. matter following: "Threatening Letters. The Middlesex grand jury have returned a true bill against a gentleman of some property named French, meaning the plaintiff." Innuendo "with this, that the said plaintiff will verify that the defendant thereby then meant to insinuate and have it understood, that the plaintiff had been suspected to have been and had been guilty of the offence of sending a letter without any name or signature thereto subscribed, directed to one Trotter, threatening to kill and murder the said Trotter, a subject of this realm, with a view and intent to extort;" and it was held, that this innuendo was bad, there being no introductory averments to warrant it, but that *the publication was libellous per se*, therefore the *innuendo* might be *rejected as surplusage*. When the scandal is susceptible of one of two meanings, as fraud or felony, an innuendo, which adopts one meaning, and gives a specific character to the slander, and which innuendo is not therefore on the face of the declaration a bad one, becomes a material part of the issue, and cannot be rejected; Smith *v.* Camden, 3 Camp. 461; Day *v.* Robinson, 1 Ad. & E. 554; 4 N. & M. 844; Williams *v.* Stott, 1 C. & M. 687; Harvey *v.* French, 1 C. & M. 11; May *v.* Brown, 3 B. & C. 128. An innuendo is very frequently used without occasion. Where there is an allegation that the words were spoken "of and concerning the plaintiff," and the words as set out either state his name or mention him thus, "you" or "he," and the slanderous matter is charged absolutely and affirmatively, an innuendo, *as* ("meaning the plaintiff") would seem to be unnecessary. Where the words import a charge of crime, and the action is for that charge, an innuendo explaining their meaning is not necessary; as "he is a thief," *or* "he robbed me." Tomlinson *v.* Brittlebank, 4 B. & Ad. 630; 1 N. & M. 455; *or* "you have done an act for which I can transport you;" Curtis *v.* Curtis, 4 M. & Scott, 174; 10 Bing. 447. The innuendo must not introduce new facts quite distinct from the words charged to have been spoken, or it will be bad; see Day *v.* Robinson, 1 Ad. & E. 554; 4 N. & M. 884, S. C. But where the words are put interrogatively, as "who stole the horse?" an innuendo applying them to the plaintiff, and stating that defendant meant that *he* stole the horse, is essential; Jackson *v.* Adams, 2 Bing. N. C. 408, per Tindal, C. J. 2 Scott, 599, S. C. Where in an action for a libel, containing matters and criticism of a general nature evidently not alluding to the

A LIBEL:(*u*)—And the defendant, further contriving and intending as aforesaid, heretofore, to wit, on [*&c.*] falsely, wickedly, and maliciously did compose and publish a certain †other false, scandalous, malicious, and defamatory libel of and concerning the plaintiff, and of and concerning [*&c. if there be a special inducement refer to the matter thereof as before,*] containing [*&c. as before.*] By means of the committing of which said grievances by the defendant, the plaintiff hath been and is greatly injured in his said good name, credit, and reputation, and brought into public scandal and disgrace, and hath been and is shunned and avoided by divers persons and otherwise injured;(*x*) To the plaintiff's damage of £——, and therefore he brings his suit, &c.

### *Other Forms for Libel, charging Crimes.*

[Form for a libel imputing to plaintiff (a gardner) larceny in *stealing* plants, &c.; Gardiner *v.* Williams, 2 C. M. & R. 78; S. C. in error, 1 M. & W. 245.

Form for a libel upon the plaintiff in regard to the *evidence* he had given †as a *witness*, under a commission of lunacy; Roberts *v.* Brown, 10 Bing. 519; 4 M. & Sc. 407, S. C.

Form for a libel imputing *forgery* or *fraud*, in obtaining a bill of exchange; Stockley *v.* Clement, 4 Bing. 162; 12 Moore, 376, S. C.

Other Forms for libels; 2 Chit. Pl. Ind. "Slander."]

### 2. *Form for a Libel not directly accusing the Plaintiff, and requiring the aid of a special Inducement.* (*y*)

For that whereas the plaintiff before and at the time of the committing

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plaintiff, and also a specific charge against him, the plaintiff, in his declaration, set out the general matter, and introduced in so doing a great variety of superfluous innuendoes, by which the plaintiff applied such matter to himself, though evidently not meant to refer to him; Denman, C. J. at the trial refused to strike out such innuendoes; and the jury gave a general verdict negativing the latter innuendoes; Prudhomme *v.* Fraser, 1 M. & Rob. 435. The Court however afterwards allowed the plaintiff to retain his verdict for that *part* of the libel which related specifically to him, and which was capable of separation from the rest, but gave the defendant costs as to the part negatived by the jury; 2 Ad. & E. 645: 1 Harr. 5.

(*u*) The new rules on pleadings prevent a second count upon the *same* libel or words with variations; but there may of course be an additional count or counts for distinct libels or words.

(*x*) No allegation, or proof, of damage is *necessary* where the words are actionable of themselves, and not in respect only of special damage, Tripp *v.* Thomas, 3 B. & C. 427; Malachy *v.* Soper, 3 Bing. N. C. 382, *per* Tindal, C. J.; 2 Stark. Ev. 2d ed. 465; Rosc. 4th ed. 374. As to special damage, see *post*, 561, note (*b*), Form 6. The above general statement of damage will not be sufficient to let in evidence of *special* damage, and will not aid even after verdict where special damage is necessary; Ayre *v.* Craven, 2 Ad. & E. 2.

(*y*) Where the written or verbal slander complained of is not *on the face of it* actionable, or does not bear the interpretation the plaintiff seeks to put upon it, and becomes actionable, or bears a particular meaning, only by the aid of *explanation*, or the statement of *extrinsic facts*, the plaintiff, in order to show a perfect cause of action, must give the requisite explanation by stating such facts; and this is term-

by the defendant of the several grievances hereinafter mentioned, was a person of good name, credit, and reputation, and deservedly enjoyed the esteem and good opinion of divers persons: *and whereas before the committing* †*by the defendant of the grievances hereinafter mentioned, (z) a certain horse of the defendant had been and was feloniously stolen, taken, and carried away by some person or persons, (or state that the defendant* " was possessed of a horse, and had asserted and charged," *or* "it had been asserted and charged," *that his said horse had been and was feloniously stolen, (a) taken, and carried away;* (*b*)) yet the defendant, well knowing the premises, but contriving, and wickedly, and maliciously, intending to injure the plaintiff, and to bring him into public scandal and disgrace,

ed a *special inducement* or statement of *introductory matter;* and must when traversed by plea, (see *post, Pleas,* "Libel,") be proved as laid; see 1 Stark. Sla. 346 355; Rosc. Ev. 4th ed. 368; 1 Chit. Pl. 6 ed. 400. Thus, if the charge be that plaintiff was *forsworn* (not perjured) there must be an introductory allegation that he had been witness in a judicial proceeding; Holt *v.* Scholefield, 6 T. R. 691; Hall *v.* Weeden, 8 D. & R. 140; 2 Ch. Pl 6 ed. 424. If it be that plaintiff "set fire to a house," aver that the house had been feloniously burnt, *or* that plaintiff had insured his house, and that it was burnt, and that defendant meant plaintiff feloniously set it on fire to defraud the office, &c.; Sweetapple *v.* Jesse, 5 B. & Ad. 27; 2 N. & M. 36; West *v.* Smith, 4 Dowl. P. C. 703; Rigby *v.* Heron, T. T. 1837, K. B. If it be that plaintiff was "a man *Friday*," there must be an inducement that by the words "man Friday," degradation and subserviency were really signified and that defendant meant to impute them; Forbes *v.* King, 1 Dowl. P. C. 672. If the charge be "you are a regular prover under bankruptcies," there must be an inducement that the words had been used to import a proof of fictitious debts; Alexander *v.* Angle, 1 Tyr. 9; 1 C. & J. 143; 7 Bing. 119; 4 M. & P. 870, S. C.

And a declaration in the circular of the Society for the Protection of Trade against Swindlers, stating that plaintiff "was improper to be balloted for, &c. as a member, &c.;" *innuendo*, that he was a *swindler;* was held bad for want of an inducement, that the society used such form of circular, to import that the person mentioned therein was a swindler; Goldstein *v.* Foss, cited *ante*, 547, note (*t*). See also the late case of a late charge of robbery of tan money; Day *v.* Robinson, in error, 1 Ad. & E. 554; 4 N. & M. 884. If the words *per se* import felony, but plaintiff charges they meant fraud, he should have an inducement accordingly; *id;* see Jackson *v.* Adams, 2 Bing. N. C. 402; 2 Scott, 599. Charge against a physician, of adultery; what inducement necessary, *post*, 551, note (*s*).

The forms of declaration for libels or slander on parties in their office, profession, or trade, also illustrates this rule; it being essential in such cases to preface that the parties held the office, or conducted the profession, &c.; see *post*, 551, 558.

But where written or printed matter *in itself* imports actionable defamation, no statement of extrinsic facts is necessary; Harvey *v.* French, 2 Tyr. 585; in error, 1 C. & M. 11; 2 M. & Sc. 591, S. C.; cited *ante*, 547, n. (*t*); Day *v.* Robinson, 1 Ad. & E. 558. As in the case of a charge of "theft," *or* "robbery," *or* "that plaintiff had been guilty of an offence for which he could be transported;" Tomlinson *v.* Brittlebank, 4 B. & Ad. 630; 1 N. & M. 455; Slowman *v.* Dutton, 10 Bing. 402; 4 M. & Sc. 174; Curtis *v.* Curtis, 4 M. & Sc. 337; 10 Bing. 447.

And it seems that in these cases of unnecessary and impertinent inducements or statements of immaterial facts, the plaintiff need not prove such facts if the words themselves support the imputation complained of; Cox *v.* Thomason, 2 Tyr. 411; 2 C. & J. 362. The statement in a libel or slander of a particular fact is an admission thereof, rendering plaintiff's proof of such fact unnecessary; 1 Stark. Sla. 2 ed. 392, 397, 85; Jones *v.* Stevens, 11 Price, 235. As to pleas traversing the inducement see *post, Pleas,* "*Libel.*" Where the inducement is material there must be a colloquium or allegation that the libel or slander was "of and concerning such matter," *ante*, 546, n. (*r*).

(*z*) See other instances in the cases cited *ante*, 549, note (*y*); Steph. 3 ed. 41. Special form where the words imputed that plaintiff set fire to his own property, which he had insured, see Sweetapple *v.* Jesse; and West *v.* Smith; Rigby *v.* Heron, cited *ante*, 549, n. (*y*).

(*a*) *Or* "taken," according to the fact, or there will be a fatal variance; see Shepherd *v.* Bliss, 2 Stark. R. 510.

(*b*) As to this special inducement, see *supra*, n. (*y*).

heretofore, to wit, on [*&c.*] falsely, wickedly, and maliciously did compose and publish, and cause and procure to be published of and concerning the plaintiff, *and of and concerning the said horse and the said ("supposed") stealing thereof*, (*c*) a certain false, scandalous, malicious and defamatory libel, containing *(amongst other things)* the false, scandalous, malicious, defamatory, and libellous matters following, of and concerning the plaintiff, *and of and concerning the said horse and the said ("supposed") stealing thereof*, (*c*) that is to say, "He (meaning the plaintiff) is the person who took my (meaning the defendant's) horse, (meaning the said horse herein first mentioned) from the field," *thereby meaning that the plaintiff had feloniously stolen, taken, and carried away the said horse.* By means, [*&c. conclude as in* Form 1.]

### 3. *For a Libel imputing Immorality or General Misconduct.* (*d*)

[The declaration will be according to Form 1, *supra*. No special inducement will be requisite if the libel import *per se* scandalous matter of an actionable nature; see *ante*, 549, n. (*y*), and the following forms.

Form for a *libel* charging that the plaintiff obtained money by *unfair play;* Digby *v.* Thompson, 4 B. & Ad. 821.

Form for imputing that plaintiff by *furious driving*, &c. drove his carriage against another, and occasioned *death*, &c.; Lord Churchill *v.* Hunt, 2 B. & Al. 685.]

### †4. *For a Libel upon the Plaintiff in his office.* (*e*)

[Form for a libel upon plaintiff in his *office* of *Mayor*, imputing peculation in regard to certain charity funds; Goodburne *v.* Bowman, 9 Bing. 532; 2 M. & Sc. 700, S. C.

Libel on a *Justice of the Peace;* Adams *v.* Meredew, 3 Y. & J. 219, overruling 2 *id.* 417, S. C.

Forms for libels on *overseers of the poor;* Cannell *v.* Curtis, 2 Bing. N.

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(*c*) The colloquium, &c. must refer to all the matters stated in the special inducement, which are material to give the necessary explanation, see *ante*, 546, n. (*r*).

(*d*) A *written* charge of *immoral conduct;*—Tuam *v.* Robertson, 5 Bing. 17; 2 M. & P. 32; or *irreligion* and *hypocrisy;* Thurley *v.* Kerry, 4 Taunt. 355; Leicester *v.* Walter, 3 Camp. 214, n.; or that plaintiff had attended a ball in the evening of the day on which he had by furious driving killed a person; Churchill *v.* Hunt, 2 B. & Al. 685; or that plaintiff had *insulted a female* in a barefaced way, and was guilty of *gross misconduct;* Clement *v.* Chivis, 9 B. & C. 172; 4 M. & R. 127, S. C.; or is a *swindler;* J'Anson *v.* Stewart, 1 T. R. 748; Chubb *v.* Flannigan, 6 C. & P. 431; or a *villain;* Bell *v.* Stone, 1 B. & C. 331; or other written imputations calculated to expose the plaintiff to ridicule or contempt; Digby *v.* Thompson, 4 B. & Ad. 821; 1 N. & M. 435; Cook *v.* Webb, 6 Bing. 409; is actionable:—but these imputations, if by *words* only, are not actionable without special damage, see *id.* Savile *v.* Jardine, 2 H. Bla. 531; Richardson *v.* Allen, 2 Chit. R. 657.

(*e*) See Com. Dig. and Bac. Ab. Libels; Stark. Sl. 115; Lumby *v.* Allday, 1 Tyr. 217; 1 C. & J. 301, S. C.

C. 223; 2 Scott, 379; 1 Hodg. 342, S. C.; Woodward *v.* Dowsing, 2 M. & R. 74.

On *Churchwardens;* Jackson *v.* Adams, 2 Scott, 599; 2 Bing. N. C. 402.]

### 4. *For a Libel upon the Plaintiff in his Profession.* (*e*)

### *For a Libel upon an Attorney.* (*f*)

For that whereas the plaintiff, before and at the time of the committing of the grievances by the defendant as hereinafter mentioned, was a person of good name, credit, and reputation, and deservedly enjoyed the esteem and good opinion of divers persons: and whereas the plaintiff, before and at the time (*g*) of the committing of the said grievances by the defendant, was an attorney, and carried on business as an attorney (*h*) with great fairness, †honor, and respectability, (*i*) and thereby made divers great gains and profits, and shortly before the time of the committing of the grievances by the defendant hereinafter mentioned, the plaintiff had been retained and employed as such attorney by one P. H., to commence and prosecute a certain action against the defendant, and had by virtue of and under such retainer commenced such action against the

(*e*) A written or verbal imputation on a professional man falsely impeaching his acquirements or professional skill, or his honesty or fidelity, &c. in his profession, is actionable without proof of special damage; Com. Dig. and Bac. Ab. Slander; Stark. Slan. 115; Selw. N. P. Slander, II. 8. In Ayre *v.* Craven, 2 Ad. & E. 2; 4 N. & M. 220, a declaration for *slander*, imputing *adultery* to the plaintiff, a physician, charged that the words were spoken of him "in his profession." And after verdict for plaintiff the judgment was arrested, because such words merely laid to be spoken of a physician are not actionable without special damage; and if they were so spoken as to convey an imputation upon his conduct in his profession, the declaration ought to show how the speaker connected the imputation with the professional conduct. See other cases as to libels on medical men, Smith *v.* Taylor, 1 N. R. 196; Ramage *v.* Ryan, 9 Bing. 533; 2 M. & Sc. 421, S. C. Libel, that physician is not qualified, and evidence; Collins *v.* Carnegi, 1 Ad. & E. 695; 3 N. & M. 703; Rosc. Ev. 4 ed. 371; 2 Stark. Ev. 2 ed. 218.

It is essential to have a special inducement of plaintiff's profession, and a colloquium, and statement that the matter was published of and concerning plaintiff "in such profession," &c.

(*f*) What matter is actionable as a libel or slander of an attorney, see Day *v.* Buller, 3 Wils. 59; Phillips *v.* Jansen, 2 Esp. R. 624; May *v.* Brown, 3 B. & C. 113; 4 D. & R. 679; Stark. Slander, 123. Words of general abuse, not relating to plaintiff as attorney, Tomlinson *v.* Brittlebank, 1 H. & W. 573.

(*g*) 1 Chit. Pl. 6th ed. 401, note (*s*).

(*h*) This general allegation is sufficient without showing admission, &c. As to evidence see 2 Stark. Ev 2d ed. 218, 460. In order to prove that plaintiff is an attorney (if denied by plea) an entered copy of the roll of attornies, signed by the plaintiff, is sufficient. So the book from the master's office, containing the names of all the attornies, produced by the officer in whose custody it is kept, is good evidence, together with proof that plaintiff practised as attorney at the time of the words spoken; R. *v.* Crossley, 2 Esp. R. 526; Lewis *v.* Walter, 3 B. & C. 138; Jones *v.* Stevens, 11 Price, 251. And the stamp-office certificate, counter-signed by the master of K. B. is sufficient *primâ facie* evidence of the party being an attorney of that court; Sparling *v.* Heddon, 9 Bing. 11. Where the libel itself admits plaintiff was an attorney, no other evidence thereof is requisite, *ante*, 549, note (*y*).

(*i*) The plaintiff's general professional character cannot be put in issue by traverse of this allegation; Jones *v.* Stevens, 11 Price, 235.

defendant: and whereas the word pettifogger means, and was and is intended by the defendant to mean an attorney guilty of low and dishonorable, and disgraceful practice as such attorney; Yet the defendant, well knowing the premises, but contriving, and maliciously, and wickedly intending to injure the plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, and to hold him up to public contumely, scorn, and ridicule, and to cause it to be suspected and believed by his neighbors and subjects that he, the plaintiff, was a person of bad character, and carried on his said business disreputably, and had knowingly commenced the said action upon insufficient ground and without adequate cause, and that he had undertaken to conduct the same as such attorney as aforesaid from unworthy and improper motives and not in the regular and usual way of his business as such attorney, and to vex, harass, oppress, and impoverish, and wholly ruin the plaintiff, heretofore, to wit, on [*&c.*] falsely, wickedly, and maliciously did compose and publish, and cause and procure to be composed and published of and concerning the plaintiff, and of and concerning his conduct as such attorney, respecting the said action, a certain false, scandalous, malicious, and defamatory libel, containing the false, scandalous, malicious, and defamatory matter following of and concerning the plaintiff and his conduct in the premises, that is to say, [*&c.*] meaning and intending thereby that the plaintiff had commenced the said action in manner aforesaid, and had knowingly undertaken the same from unworthy and improper motives and not in the regular and usual way of his business as such attorney, and that he carried on his said business as an attorney in a low and pettifogging manner. By means of the committing of which said grievances by the defendant as aforesaid, the plaintiff hath been and is greatly injured in his said good name, fame, and credit as such attorney and otherwise, and brought into public scandal, infamy, disgrace, contempt, and ridicule, and by reason of the committing of the said grievances by the defendant as aforesaid, divers persons have from thence wholly refused and still do refuse to have any transaction, acquaintance, or discourse with the plaintiff as they were before used and accustomed to have, and otherwise would have had; and the plaintiff hath been and is by means of the premises greatly injured in his said profession and business, and otherwise.

### †*Other Forms of Libels on Professional Men.*

[Form for a libel upon a *Proctor*, charging him with extortion; Clarkson *v.* Lawson, 6 Bing. 266.

Form for a libel on plaintiff as an *Attorney* and *Vestry-Clerk* of a parish; May *v.* Brown, 3 B. & C. 113.

On *Physicians;* see cases, cited *ante*, 551, note (*e*).]

### 6. *For a Libel on the Plaintiff in his Trade or Occupation.* (*k*)

[*See general Form for Slander, post,* 558, Form 5.]

### *For a Libel on a Railway Company.* (*l*)

For that whereas the said company, before and at the times of the committing of the grievances by the said defendant as hereinafter mentioned, were and still are a company, incorporated by the name and style aforesaid, and acting under and by virtue of the provisions of a certain act of parliament made and passed in the —— year of the reign of his late majesty King William the Fourth, intituled "An Act," [*&c.*] for the purpose of carrying into effect a certain undertaking, to wit, the making such railway from —— aforesaid to —— aforesaid, for the carriage of passengers, goods, chattels, and merchandize on the said railway for hire and reward to the said company, and for divers other useful and laudable purposes; and the making the said railway, with all proper and necessary works and conveniences connected therewith, was and is calculated to be and produce a great public good, by opening a cheap and expeditious communication between the metropolis, the port of London, and the town and neighborhood of ——, and was and is likely and calculated to facilitate the means of transit and traffic for passengers, goods, and chattels, and merchandize, between the metropolis and the southern and western parts of England, and between the metropolis and —— respectively, and the adjacent districts and the several intermediate towns and places. And whereas the said undertaking originated with and was set on foot and promoted by various persons having an interest in the improvement and advancement of the said town of ——, and the neighborhood thereof, and in the property in the said town and the neighborhood thereof, and in the districts and places upon and near to the line of the said intended railway; and very many of the said persons with whom the said undertaking originated were resident in the said town and in the neighborhood thereof, and upon and near to the line of the said intended railway; and the said undertaking was conceived and set on foot and

(*k*) The general rule is, that any libel or words spoken of a tradesman or party seeking a livelihood by an occupation, (though not a trader, subject to the bankrupt law; Whittington *v.* Gladwin, 5 B. & C. 180; 7 D. & R. 649;) and imputing to him insolvency, want of capacity, or dishonesty in his calling, and calculated to prejudice him therein, is actionable without special damage; Bac. Ab. Slander, B. 4; Stark. Sl. 2d ed.; Selw. N. P. tit. Slander; Figgins *v.* Cogswell, 2 M. & Sel. 369; Saville *v.* Sweeny, 4 B. & Ad. 514. Charge of immorality against a tradesman, *supra,* 551, n. (*e*). Partners in trade may join for a libel upon or slander of them in their business; Cook and another *v.* Batchellor, 3 B. & P. 150.

(*l*) This form was settled in consultation with counsel. The libel charged that the undertaking originated with gamblers, and was a delusion and bubble, and attacked the company, and contained many misstatements upon the points to which the inducement bears reference. It was not considered *essential* to make all the statements contained in the inducement; but under the particular circumstances, and with reference to the effect at the trial, such statements were deemed judicious.

ed for the fair and *bonâ fide* purpose of making a superior com-
on by means of the said railway from London to ——, and for
imate, reasonable, and useful purposes in connection therewith;
iects have always been pursued by the said company, and
ed, with industry, zeal, and integrity, as the said defendant
d whereas by the said act of parliament, the said company
l to raise a sum not exceeding £——, for making and
e said railway and other works, by the said act authorized,
the general purposes of the said act; and it was and is provided
and by the said act, that such capital should be divided into —— shares
of £—— each; and whereas, before and at the time of the committing
by the defendant of the grievances hereinafter mentioned, the existing
traffic upon the line of road over and along which the said railway was
by the said act to pass, including coach parcels and merchandize, would
produce a much larger sum than £—— per centum on £——; and
whereas, before the committing by the defendant of the grievances here-
inafter mentioned, the said company had applied to parliament for the
purpose, amongst other things, of obtaining the power to raise, by shares,
a further sum, being much less than £——, to wit, £—— as a further
and additional capital, to be divided into —— shares, of £—— each;
and a certain bill had been and was brought into and was and is pending
in parliament for that purpose, and such bill never contained any provis-
ion, nor was it ever contemplated or intended that such new shares should
take precedence of any dividends; and whereas before and at the time of
the committing by the defendant of the grievances hereinafter-mentioned,
the plan contemplated by the said company for disposing of the said shares,
was to give to the holders of annual shares in the said company the option
of taking the said new shares in rateable proportion to the shares of which
the said holders were on a certain day, to wit, the —— day of —— A. D.
——, the registered proprietors in the said company; and in case the
whole number of the said new shares should not be taken as aforesaid,
then to offer the remainder to such registered proprietors of original
shares as were disposed to take more than their rateable proportion; and if
any of the said new shares should then remain, to offer such remainder to
the public; and whereas before the committing by the defendant of the
grievances hereinafter-mentioned, the said plan was adopted at a general
meeting of the said company, and the details of the said plan were and
had been published in a certain public newspaper, called the "——;" Yet
the defendant, well knowing the several premises, but contriving, and
wickedly and maliciously intending to impede the said undertaking and
injure the said company, and to bring the said company into public dis-
grace and contempt, and to depreciate the value of the property of the
said company, and of the shares therein, and to impoverish and ruin the
said company, heretofore, to wit, on the —— day of ——, A. D. ——,
falsely, wickedly, and maliciously, did publish, and cause to be published,

in a certain newspaper, called the "——," a certain false, scandalous, malicious, and defamatory libel of and concerning the said company, and the said undertaking, and of and concerning the said application to parliament, and the said bill so brought into parliament in reference to such additional capital, and of and concerning the said several matters and premises, containing the false, scandalous, malicious, and libellous matters following of and concerning the said company and the said undertaking, and of and concerning the said application to parliament and the said bill so brought into parliament, in reference to such additional capital, and of and concerning the said several matters and premises, that is to say [*here set out libel,*] by means of the committing of which said grievances by the defendant as aforesaid, the said company have been and are greatly injured and brought into public disgrace and contempt, and the value of the property of the said company, and of the shares therein, was and is much depreciated; and the said company have been and are otherwise greatly damnified; To the damage of the said company of £——, and therefore they bring their suit, &c.

### *Other Forms for Libels on Parties in their Business, Trade, Occupation, &c.*

[Form for a libel upon a *banking firm*, charging they had stopped payment; Forster *v.* Lawson, 3 Bing. 452; Bromage *v.* Prosser, 4 B. & C. 247.

Form for a libel upon plaintiff as a *stage coach proprietor;* Clement *v.* Chivis, 9 B. & C. 172.

Form for a libel, charging that a commercial firm were a swindling concern; Clarke *v.* Taylor, 2 Bing. N. C. 654.

Form against a society for the protection of trade for publishing the plaintiff's name in a list of persons who were deemed swindlers in trade by the society; Goldstein *v.* Foss, in error, 4 Bing. 489; Humphreys *v.* Miller, 4 C. & P. 7.

Form for a libel on plaintiff as surveyor, &c. to a company; Rutherford *v.* Evans, 6 Bing. 451.

Form for a libel on plaintiff as a civil engineer, whereby he lost his election to the office of engineer to certain commissioners; Brooks *v.* Blanchard, 1 C. & M. 779.

†Form for a libel on plaintiff as the vendor of a medicine; Morrison *v.* Harmer, 3 Bing. N. C. 759.

Form by a servant against his late master, for a libel, whereby plaintiff lost a situation; Pattison *v.* Jones, 8 B. & C. 578.

Form for a libel on plaintiff as a cook; Prudhomme *v.* Fraser, 1 M. & Rob. 435; 2 Ad. & E. 645; 1 Harr. & W. 5, S. C.]

[7. *For a Libel on Plaintiff's Title to an Estate, post,* 562.]

2dly. SLANDER.

1. *General Form of a Declaration for Verbal Slander, directly charging an Indictable Offence, and not requiring Explanation by Inducement.* (*m*)

For that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, was a person of good name, credit, and reputation, and deservedly enjoyed the esteem and good opinion of divers persons; (*n*) yet the defendant, well-knowing the premises, but contriving, and wickedly and maliciously (*o*) intending to injure the plaintiff and to bring him into public scandal and disgrace, heretofore, to wit, on [*&c.*] in a certain discourse which the defendant then had of and concerning the plaintiff, (*p*) in the presence and hearing of divers persons, (*q*) then in the presence and hearing of those persons, falsely (*r*) and maliciously spoke and published of and concerning the plaintiff (*s*) the false, scandalous malicious, and defamatory words following, that is to say, (*t*) "*He*," (meaning the

(*m*) See *ante*, 549, note (*y*). See Forms, &c. 2 Chit. Pl. 5th edit. 633, 6th edit. 435. In general *verbal* defamation is not actionable, unless it impute a felony, misdemeanor, or offence punishable at law by indictment, &c.; a verbal charge of mere immorality or dishonesty (not indictable) is not actionable, *ante*, 550, n. (*d*); unless there be special damage; *post*, 561, note (*b*). The word "thief," or a charge that plaintiff "*robbed* A. B." or "committed an offence for which he could be *transported*," are *primâ facie* actionable of themselves without introductory explanation, or innuendo, or proof to show that felony was really meant; *ante*, 548, note (*t*): and if defendant intended no such imputation, he must prove it. The Court and jury will interpret the words according to their popular meaning; Woolnoth *v.* Meadows, 5 East, 463; 2 Smith R. 28; Penfold *v.* Westcote, 2 N. R. 335. But the charge that plaintiff was *forsworn*, requires averment that plaintiff had been a witness in a suit, &c. and an innuendo that the defendant meant to charge *perjury*; Holt *v.* Scholefield, 6 T. R. 691; Hall *v.* Weeden, 8 D. & R. 140. "I will take him to Bow Street on a charge of forgery" is not *per se* actionable; Harrison *v.* King, 7 Taunt. 431; 4 Price, 46. As to *costs*, *ante*, 545, note (*h*).

(*n*) As to this general inducement, see *ante*, 545, note (*i*).

(*o*) See *ante*, 545, note (*o*).

(*p*) As to the colloquium, &c. see *ante*, 546, note (*r*).

(*q*) Allegation "in the presence, &c. of A. B. and others." Proof that the words were uttered before others, but not A. B., variance not material; Bull. N. P. 6; Rosc. 4th ed. 372

(*r*) See *ante*, 545, note (*u*).

(*s*) See *ante*, 546, note (*r*).

(*t*) We have seen that the very words must be set out verbatim, *ante*, 546, n. (*s*). Slanderous words charged as addressed to the plaintiff in the second person, are not supported by evidence of words spoken of him (though present) in the third person; Stannard *v.* Harper, 5 M. & R. 295, and *vice versâ*; Rex *v.* Berry, 4 T. R. 217. If words be uttered as the words of another, or as a rumor, but be described as defendant's words, expressing his own sentiments, this is a variance; M'Pherson *v.* Daniels, 10 B. & C. 274; Bell *v.* Byrne, 13 East, 554.

"She is a thief and ought to have been transported," instead of, "She is a bad one and ought," &c. held a fatal variance; Hancock *v.* Winter, 2 Marsh. R. 502; 7 Taunt. 205. "She takes snuff," instead of "*I believe* she takes snuff," held fatal;

plaintiff,) (*u*) [*setting out the †words.*] [*Second count.* (*x*) And afterwards, to wit, on [*&c.*] in a certain other discourse which the defendant then had in the presence and hearing of divers other persons of and concerning the plaintiff, the defendant, further contriving and intending as aforesaid, then, in the presence and hearing of those persons, falsely and maliciously spoke and published of and concerning the plaintiff, (*y*) other the false, [*&c. as before*]; By means [*&c. state general damage as in* Form 1, *ante*, 548; *see id. note* (*x*). *If the plaintiff claim damages for a special injury, state such injury; see post*, 561, Form 6, *and note, id.*]]

## 2. *Form, for Slanderous Words not directly accusing the Plaintiff of an Offence, and requiring the aid of a Special Inducement.*(*z*)

For that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, was a person of good name, credit, and reputation, and deservedly enjoyed the esteem and good opinion of divers persons. And whereas, [*here state the special or extrinsic matter in reference to which the words were spoken, and which require the assistance of such statement to render them actionable, or to apply their meaning to a particular point; see* ante, 549, *note* (*y*); *and many forms in the cases referred to there; see* Form 2, ante, 549, *and Forms*, 2 *Chit. Pl.* 6 ed. 435, 438. *Form for an indirect charge of Perjury*, id.; *and* Angle *v.* Alexander, 7 *Bing.* 119, 4 *M. & P.* 870, *S. C. Form of Inducement, where the charge was that plaintiff set fire to his own house;* Sweetapple *v.* Jesse, 5 *B. & Ad.* 27; 2 *N. & M.* 36, S. C.; West *v.* Smith, 4 *Dowl. P. C.* 703; ante, 549, note (*y*).] Yet the defendant, [*&c. proceed as in preceding form, taking care to charge not only that the discourse †was had and the words were spoken,* "of and concerning the plaintiff," *but also,* "and of and concerning the said ——," *or,* "and of

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Cook *v.* Stokes, 1 Mo. & Rob. 237. "*This* is my umbrella, and he stole it," instead of "*It* is my &c." held fatal; Warlters *v.* Mace, 2 B. & Al. 756; see Cook *v.* Stokes, 1 M. & Rob. 237. Many of these errors would now probably be amended at the trial. "You stole one of my sheep," instead of "You stole my sheep and killed it;" Robinson *v.* Wallis, 2 Stark. R. 194; and "I will do my best to transport him, as he has been working for me some time, and has been robbing me all the while," instead of "he has been working for me some time, and has been continually robbing me;" Dancaster *v.* Hewson, 2 M. & R. 176; held not material variances. "Ware Hawk, you must take care of yourself there, mind what you are about," but the words were, "Ware Hawk there; mind what you are about;" held no variance, though plaintiff did not prove the latter part of the sentence laid in the declaration; Orpwood *v.* Bankes, 4 Bing. 261; 12 Moor. 492, S. C. Words spoken in a foreign language, or in Welsh, should be set out in such language, adding, "that the words signified and meant, and were understood to mean, as follows, in the English language, that is to say," &c.; see *ante*, 547, note (*s*). Words spoken ironically, or by way of question, should be so described; 1 Chit. Pl. 6 ed. 405; Forms, 2 *id.* 450; Barnes *v.* Holloway, 8 T. R. 150: Bromage *v.* Prosser, 4 B. & C. 247.

(*u*) As to the innuendo, see *ante*, 547, note (*t*).

(*x*) See *ante*, 548, note (*u*). Words spoken at different times may be given in evidence on one count; Charlter *v.* Barret, Peake, R. 22.

(*y*) If there be a special inducement, say, "and of and concerning the said," &c.; see 545, note (*r*).

(*z*) *Ante*, 549, note (*y*).

and concerning the several matters and premises aforesaid"; *see ante*, 549, *note* (*y*), *and* Form 2, *ante*, 549; *and then add an innuendo, giving the particular meaning as in that form.*] By means, [*&c. as in* Form 1, *ante*, 548.

### 3. *For Slander of the Plaintiff in his Office.*

[See Forms, &c. *ante*, 551, Form 4. Slander of a Magistrate, 2 Chit. Pl. 6 ed. 440; 3 Burn, J. tit. "*Justice*," &c.]

### 4. *For Slander of the Plaintiff in his Profession.*

[See the Forms, *ante*, 551 to 553, and notes.]

For that whereas, [*state plaintiff's general good character as in* Form 1, *ante*, 556;] and whereas before and at the time of the committing of the several grievances by the defendant hereinafter mentioned, the plaintiff was, and still is, an attorney, [*or* "physician," *&c. as the case may be*,] and hath always exercised and carried on the said profession and business with honesty, integrity, [*skill*,] credit, and reputation, [*using such words as are applicable, in reference to the nature of the calumny*,] to the comfortable support of himself and his family, and the increase of his riches. [And whereas, *stating any special matter necessary to explain or give effect to the slanderous words; see* Form 2, *ante*, 549;] Yet the defendant, [*proceed as in* Form 1, *ante*, 556, *to the end of the statement of the words, taking care to state that the discourse was had, and the words were spoken* "*of and concerning the plaintiff*," "and of and concerning him in relation to his said profession and business;" *and if there be a special inducement of particular matter, add*, "and of and concerning the said ——," *&c.*] By means [*&c. proceed and conclude as in* Form 5, *ante*, 552; *stating special damage, if any; see* Form 5, *post*, 561.

### 5. *For Slanderous Words of the Plaintiff in his Trade or Occupation.*(*a*)

[*Form imputing dishonesty.*]

For that whereas the plaintiff, [*state the general good character as in* Form 1, *ante*, 556.] And whereas before and at the time of the committing by the defendant of the grievances herinafter mentioned, the plaintiff was a ——; and hath always used and exercised the said trade and business, and conducted himself therein with integrity and fairness of dealing. And whereas, [*state any extrinsic facts, if any, necessary to be shown in order to explain the words; see ante*, 549 and 557.] Yet the de-

(*a*) See Forms and law, *ante*, 553 to 566; 563, note (*k*).

fendant, well knowing, [*&c. proceed and conclude as in last form, stating* "trade and business," †*instead of* "*profession;*" *and taking care to lay the colloquium, &c.* "of and concerning the plaintiff and of concerning him in his said trade and business"; *and if there be a special inducement, adding,* "and of and concerning," [*&c.*]

### 6. *By a Tradesman, for Words imputing that he would be in the Gazette shortly; the Words not expressly naming him, and there being special damage.*

For that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, used, exercised, and followed, and still doth use, exercise and carry on the trade and business of a [linen-draper,] and hath always conducted the same with great punctuality of dealing, well and faithfully observing and keeping his engagements and paying his debts; and the plaintiff was not, before or at the time of the speaking and publishing of the several false, scandalous, and malicious words hereinafter mentioned, nor at any time since, in embarrassed or insolvent circumstances, or a bankrupt, or likely to become bankrupt; and by reason of the premises, the plaintiff, until the speaking of such slanderous words, was deservedly held in great credit and esteem by his neighbors and others, and particularly by those with whom he had had any dealings in his said trade and business, and enjoyed great reputation therein, whereby the plaintiff daily acquired divers great gains and emoluments in his said trade and business, to the support and maintenance of himself and his family, and the great increase of his fortune. [And whereas the plaintiff, before and at the time of the speaking and publishing of the slanderous words hereinafter mentioned by the defendant, resided and carried on his said trade and business in a certain road, to wit, "B—— Road, in the parish of C——, in the county of S——." (*b*)]. Yet the defendant, well knowing the premises, but contriving, and wrongfully and maliciously intending, to injure and destroy the good name and reputation of the plaintiff in his said trade and business, and to cause him to be regarded as a person of no credit, worth, or substance, and in insolvent circumstances, and to have become bankrupt, and thereby to injure and prejudice him in his said trade and business, during the time the plaintiff so resided in the said place, so called B—— Road, and carried on his trade and business there as aforesaid, to wit, on [*&c.*] in a certain discourse which the defendant then had with divers good and worthy subjects of this realm, of and concerning the plaintiff and his circumstances, and in relation to his said trade and business, falsely and maliciously spoke and published of and concerning the plaintiff and his circumstances, and in relation to his said trade and busi-

(*b*) This allegation was deemed proper in the particular case, to identify the plaintiff as the person alluded to by the defendant.

ness, in the presence and hearing of divers subjects of our lady the queen, these false, scandalous, malicious, and defamatory †words following (that is to say,) "a linen-draper in the road, (meaning the plaintiff, and thereby meaning B—— Road aforesaid,) will be in the Gazette, (meaning the London Gazette,) on Saturday or Tuesday night," thereby meaning that the plaintiff was in insolvent circumstances, and *had become* a bankrupt, [*or*, "was about and likely to become a bankrupt," *according to the fact*]; by means of the committing of which said several grievances by the defendant, the plaintiff hath been and is greatly injured and prejudiced in his said good name, credit, and reputation, and in his said trade and business; and divers persons, who had, before the speaking of the said several slanderous words, been used and accustomed to deal, and divers other persons who would otherwise have dealt, with the plaintiff in his said trade and business, have since that time, and wholly on that account, respectively refused so to do, and particularly one E. F. by reason of the speaking and publishing such words by the defendant, then refused, and thence hitherto hath refused, to have any dealings or transactions with the plaintiff in his said trade and business, as he otherwise might and would have had; and thereby the plaintiff hath lost and been deprived of divers gains and profits which would otherwise have accrued to him in his said trade and business, and was and is otherwise injured; To the plaintiff's damage of £——, and therefore he brings his suit, &c.

### *Other Forms for Slander of Plaintiff in his Business, Trade, or Occupation.*

[Form for words imputing insolvency to bankers; Bromage *v.* Prosser, 4 B. & C. 247; Forster *v.* Lawson, 3 Bing. 452.

Declaration for slander, imputing to plaintiff, a tradesman, that he had spread a report calculated to injure a public sale by another tradesman, whereby the latter refused to deal with the plaintiff; Wood *v.* Adam, 6 Bing. 481; 4 M. & P. 208; 4 C. & P. 269, S. C.

For slanderous words spoken of plaintiff as clerk of a company; Lumley *v.* Allday, 1 C. & J. 301.

For slander of the plaintiff as chief mate of a merchant ship; Andrews *v.* Thornton, 8 Bing. 431; 1 M. & Sc. 670, S. C.

For a libel on a toll collector and treasurer, Sellers *v.* Tell, 4 B. & C. 655.

For slanderous words of a coach proprietor and seller of horses, showing *special damage;* M'Pherson *v.* Daniels, 10 B. & C. 263.

For slandering a boarding-house keeper; Saville *v.* Sweeny, 4 B. & Ad. 514; a governess, 2 Chit. Pl. 6th edit. 443; 5th ed. 641 c.

For slander of a journeyman in his occupation, whereby his employer discharged him; Towgood *v.* Spyring, 1 C. M. & R. 181.

Slander of a domestic servant; 2 Chit. Pl. 5th edit. 630 c; 6th edit.

433; Rogers *v.* Clifton, 3 B. & P. 587; Pattison *v.* Jones, 8 B. & C. 578; Child *v.* Affleck, 9 *id.* 403; *ante*, 556.]

†7. *For Words actionable only in respect of Special Damage.* (*b*).

[The declaration will be in the common form (*c*) as *ante*, 556, Form 1, to the end of the statement of general damage, and then proceed to state

(*b*) Although words be not actionable as imputing to the plaintiff an offence punishable at law, or relating to or affecting him in his office, profession, or business, (see *ante*, 549, note (*y*), 553, note (*k*)) yet they may be in themselves of a *disparaging nature*, (as "swindler," rogue," "adulterer," see *ante*, 550, note (*d*),) and if they be so, (see Kelly *v.* Partington, 5 Ad. & E. 645; 3 N. & M. 117;) and be false and malicious, and occasion *special damage*, or a particular injury to the party accused, he may maintain an action in respect of such damage; see 1 Stark. Sl. 2d ed. 190. An action does not lie for slander of title though conveyed by writing, unless there be special damage; Malachy *v.* Soper, 3 Bing N. C. 371. Where particular damage is the gist of the action, it must be specially laid, and proved as charged, in the declaration, and no evidence of it will be received unless it be stated with particularity and certainty. And where this is not done, the declaration will be substantially bad, and the plaintiff will not be permitted to rely upon the general or common statement of injury to his reputation; see Bul. N. P. 6; Giere *v.* Britton, *id.* 7; 1 Saund. 243, note 5; 2 Stark. Ev. 2d ed. 465, 466. Thus, if the injury be that certain persons declined to deal with the plaintiff, the names of such persons must be stated in the declaration; and the loss of customers not named, cannot be proved at the trial; *id.*; Hartley *v.* Herring, 8 T. R. 130; Malachy *v.* Soper, *supra*. But where the statement of special damage with great particularity would, from the nature of the case, be attended with great difficulty and prolixity, and cannot reasonably be required, a more general allegation is allowed. Thus where the declaration in an action for slander, imputing incontinence to the plaintiff, stated that he was preacher to a dissenting congregation in a certain chapel, and derived considerable profit from his preaching, and by reason of the slander "the said persons frequenting his chapel had refused to permit him to preach there, and had discontinued giving him the gains which they usually had and otherwise would have given," it was held sufficient without saying who those persons were; Hartley *v.* Herring, 8 T. R. 130. Where the declaration stated that in consequence of the libel, the plaintiff lost the profits of certain performances at the theatre, it was held that the box-keeper might be asked whether the receipts of the house had not diminished, but not whether particular persons had not in consequence given up their boxes; Ashley *v.* Harrison, 1 Esp. 48. Special damage cannot be traversed by the plea where it is not the gravamen of the action; Smith *v.* Thomas, 2 Bing. N. C. 372; 1 Hodges, 355, S. C. It must be the direct or immediate consequence of the defendant's act, and, it seems, arise *wholly* therefrom. Where the plaintiff's master discharged him partly in consequence of the defendant's scandal, and partly on account of his having been dismissed by a former master, it seems the action does not lie; 2 Stark. Ev. 2d ed. 466. An allegation that by reason of the words one D. refused to trust the plaintiff, is not supported by evidence that defendant spoke the words to E., who repeated them to D. as the defendant's words; Ward *v.* Weeks, 7 Bing. 211; 4 M. & P. 796. An averment that "by reason of the premises, persons who would otherwise have retained and employed the plaintiff, declined to do so," is not proved by showing that other persons would have *recommended* the plaintiff, and that the persons named in the declaration would have employed plaintiff *on such recommendation*; Sterry *v.* Foreman, 2 C. & P. 592. The declaration should have laid the loss of the recommendation also. It is not essential in these cases that the party refusing to deal with or trust the plaintiff, or dismissing him, in consequence of the slander, should *believe* that it is true; Knight *v.* Gibbs, 1 A. & E. 43; 3 N. & M. 467. It is necessary to call such party, and not sufficient to prove merely his declarations as to the cause of his declining to deal, &c.; 1 Saund. 243 d, n.; Tilk *v.* Parsons, 2 C. & P. 201. It has been decided that if the damage arising from the slander be the *wrongful* act of a third person, as his dismissal of the plaintiff before the expiration of the term for which he was engaged, or other wrongful breach of contract, &c., such act is not a sufficient ground of action against the utterer of the slander; it not being the natural and legal conse-

the special damage according to the fact, which may be thus:—"And also by reason of the committing of the said grievances by the defendant, certain persons, to wit, E. F., G. H., [&c. who had theretofore dealt and had transactions with the plaintiff in his trade or business of a ——, by him then and thence hitherto carried on]; afterwards, to wit, on the day and year aforesaid respectively declined and refused, and have thence hitherto respectively declined and refused to have any dealings or transactions with the plaintiff in his [said] trade and business, [*add*, of [*&c.*] *if not mentioned before*,] as they otherwise might and would have had; whereby the plaintiff hath lost and been deprived of divers gains and profits which would otherwise have arisen and accrued to him in that behalf;" *or* "and also by reason of the committing [*&c.*], one —— who would otherwise have sold to the said —— certain goods, to wit, [*&c.*] on credit, afterwards, to wit, on [*&c.*] declined and refused so to do; whereby &c.;" *or* "and also by reason [*&c.*], one —— who otherwise might and would have retained the plaintiff in the capacity of —— to him the said ——, in his business of —— as and for wages and reward to the plaintiff, afterwards, to wit, on [*&c.*] declined and hath thence hitherto declined so to do; whereby the plaintiff lost and hath been deprived of the wages, reward, and advantages which would otherwise have accrued to him;" *or* "and also by reason [*&c.*], one —— who had theretofore retained plaintiff in the capacity [*&c.*] at and for [*&c.*], afterwards, to wit, on [*&c.*] discharged the plaintiff from his employ, and hath thence hitherto declined to retain or employ him therein; whereby &c." How to state special damage in regard to the loss of recommendation, *ante*, 561, note (*b*). Form of statement in respect of the loss of the benefits arising from the hospitality of friends, Moore *v.* Meagher, 1 Taunt. 40; 3 Smith, 135, (good form.) Other Forms, Hartley *v.* Herring, 8 T. R. 130, and in cases cited *ante*, 561, note (*b*).]

## 8. *For Slander of Title.*

[See Forms 2 Chit. Pl. 6th ed. 451, 5th ed. 641; Rowe *v.* Roach, 1 M. & Sel. 304; Pitt *v.* Donovan, *id.* 639; Smith *v.* Spooner, 3 Taunt. 246; Millman *v.* Pratt, 2 B. & C. 486; 3 D. & R. 728; Malachy *v.* Soper, 3 Bing. N. C. 371. The law on this subject is fully explained in the latter case, (and see 1 Stark, Sl. 2d ed. 192; 2 Har. Ind. 931, tit. "Defamation, XV.") It was held in Malachy *v.* Soper, that special damage is the *gist* of the action, although the slander be in writing; see 2 Stark. Ev.

quence of the words; Vicars *v.* Wilcocks, 8 East, 1; Morris *v.* Langdale, 2 B. & P. 284. But this doctrine seems doubtful; see 2 Stark. Ev. 2d ed. 466, note (*g*); Newman *v.* Zachary, Aleyn R. 3, and has lately been doubted. As to costs in actions for special damage, see *ante*, 545, note (*h*).

(*c*) It is necessary to set out the libel or words *verbatim*, though the action be for matter actionable only in regard to special damage; Gutsole *v.* Mathers, 1 M. & W. 495; 1 Tyr. & G. 694, S. C.

466. The libel or very words themselves must be set out verbatim in an action for slander of title; Gutsole *v.* Mathers, 1 M. & W. 495: 1 Tyr. & G. 694, S. C.

†MALICIOUS ARREST, &c. AND MALICIOUS PROSECUTION. (*d*)

## 1. *For a malicious Arrest for a Debt.*

For that whereas the defendant, heretofore, to wit, on [*&c. date of writ, but exact day not material*], not then having any reasonable or probable cause of action whatsoever against the plaintiff, to the amount [*if there were no cause of action say*, "in respect of," *instead of the words* "to the amount"] of the sum of money for which he caused the plaintiff to be arrested as hereinafter mentioned, [*if there were no cause of action, add*, "or any part thereof,"] (*e*) but contriving and intending to injure the plaintiff, falsely and maliciously (*f*) caused to be issued and prosecuted out of the Court of [*see* Form 1, *ante*, 431,] at the suit of the defendant

(*d*) See in general 3 Bla. C. 126; Bac. Ab. Action on the Case, H.; Com. Dig. Action upon the Case for a Conspiracy, A.; Sel. N. P., and 2 Stark. Ev. tit. "Malicious Arrest," &c.; Har. Ind. and Add. tit. "Case, Action of, I."; 3 Chit. Gen. Pr. 327; 2 Chit. Pl. 6th ed. 405, notes. In order to maintain an action for an unfounded arrest, the plaintiff must show, 1. The *absence* of *probable cause* or reason for such arrest; 2. *Malice* in instituting the former action; 3. The former suit, and *arrest* or imprisonment therein by the defendant, and 4. That the former suit has been *determined* in plaintiff's favor, *id.*: that is, he must prove such of these matters as are put in issue by the defendant's pleas, see *post*, *Pleas*, "Malicious Arrest." The action must be in *case*, and must show all these essential ingredients. Whether or not there was "probable and reasonable cause" for an action or prosecution is a mixed question of fact and law: the jury have to find the facts attending and giving a character to the prosecution in reference to the proposition, and the judge has to decide the question of law, whether or not the circumstances, when found or undisputed, afforded probable cause; see Blachford *v.* Dod, 2 B. & Ad. 179; Venafra *v.* Johnson, 10 Bing. 301; 3 M. & Sc. 847, S. C.; Roso. 4th ed. 384, 385, 388, 389; 2 Stark. Ev. 2d ed. 492. See Macdonald *v.* Rooke, 2 Bing. N. C. 217; 2 Scott, 359; 1 Hodg. 314, where under a state of facts, the judge was held warranted in leaving the question to the jury; and see Venafra *v.* Johnson. It is incumbent on the *plaintiff* to adduce some evidence, though slight, and *primâ facie* testimony will suffice, of the want of probable cause for the action or prosecution; but proof of the most express malice will not *per se* establish the absence of reasonable cause for the proceeding; Taylor *v.* Willans, 2 B. & Ad. 857; Johnstone *v.* Sutton, 1 T. R. 545; Turner *v.* Turner, Gow, R. 20. The various modes of *proving* and *disproving* probable cause, and the authorities upon the subject, are stated and collected in the excellent works on evidence above referred to, and in Har. Ind. tit. "Case, Action of, I." *Malice* (which is of two kinds, viz., malice in *law* and malice in *fact*, or *actual* malice, 2 Stark. Sl. 2d ed. 486, 487, tit. "Malice,") must also be proved by the plaintiff, to maintain an action for an unfounded arrest or prosecution. He must prove malice in fact, independently of the act itself done by the defendant, *id.* 488, 494, 498. From proof of want of probable cause, the *jury may* however infer malice, such proof is *primâ facie* evidence of malice; but this is an inference not of *law* but of *fact*, which the jury are not *bound* to draw; and the presenting to the jury the absence of probable cause, as conclusive evidence of legal malice, is a misdirection; Mitchell *v.* Jenkins, 2 N. & M. 301; 5 B. & Ad. 588; see the works on evidence as to proof of malice.

(*e*) See Wetherden *v.* Embden, 1 Camp. 295; Williamson *v.* Mawbey, *id.* 297.

(*f*) As to malice see *supra*, note (*d*). It seems that the word "*wrongfully*" would suffice; 1 Saund. 242 a, note 2; 2 Chit. Pl. 2d ed. 406, note (*r*).

against the plaintiff, a certain writ of our lady the queen called a *capias*, directed to the sheriff of——, whereby our said lady the queen commanded the said sheriff that [*&c. set out writ as in the* Form, *ante*, 418, 419]; (*g*) and the defendant, further contriving and intending as aforesaid, afterwards, to wit, on the day and year aforesaid, falsely and maliciously and without having such reasonable or †probable cause of action as aforesaid, caused the said writ to be indorsed for bail for £——, and to be delivered to the said sheriff to be executed according to law; and the defendant afterwards and whilst the said writ was in force, to wit, on [*&c.*], further contriving and intending as aforesaid, and not having any such reasonable or probable cause of action as aforesaid, falsely and maliciously caused the plaintiff to be arrested (*h*) under and by virtue of the said writ, and to be detained and imprisoned thereon for a long time, to wit, from thence until (*i*) and upon the —— day of —— in the year aforesaid, when the plaintiff, to obtain his liberation, procured certain persons, to wit, —— and ——, to become bound by bond to the said sheriff for his the plaintiff's causing special bail to be put in for him to the said action according to the exigency of the said writ, [*or* "when the plaintiff, to obtain his liberation, deposited with the said sheriff the amount so indorsed on the said writ, together with a large sum, to wit, £10, for costs, according to law," *as the case may be*]; and the defendant avers, that such proceedings were thereupon had in the said suit that [*here state the mode by which the former suit was determined; (k)* see Forms 2 Chit. Pl. 5th ed. 604 to 606, 6th ed. 407 to 409; Tidd, App. 169 to 393; T. Chitty's Forms, 201, and *id.* Index, tit. "Judg-

(*g*) The writ and indorsement should be accurately stated; Gadd *v.* Bennett, 5 Price, 540.

(*h*) This allegation requires evidence of an *arrest*, and is not proved by showing a bail-bond without a caption; Berry *v.* Adamson, 6 B. & C. 528; 9 D. & R. 558; 2 C. & P. 503, S. C.; see Bates *v.* Pilling, 2 C. & M. 374; Amor *v.* Blofield, 9 Bing. 91; 2 M. & Scott, 156, S. C. See form of count for maliciously holding to bail without stating arrest, Small *v.* Gray, 2 C. & P. 605, (*sed qu.*)

(*i*) The above allegation does not positively require proof of bail given to support the action; and an action lies for the detention without such proof; Bristow *v.* Heywood, 4 Camp. 213; 1 Stark. R. 48.

(*k*) The legal termination of the former suit must be alleged in the declaration and (if denied by plea) proved at the trial; see *ante*, 563, note (*b*). It is laid down that the omission to show that the suit has been determined, is cured by verdict; see 1 Saund. 228 b; 1 Chit. Pl. 6th ed. 679, 2d ed. 407, note (*b*), (*sed qu.*) A general allegation that the suit was ended and determined, not showing how, would no doubt be sufficient after verdict, and perhaps on general demurrer, but would probably be held insufficient on special demurrer; see Forms, &c. referred to 2 Chit. Pl. 5th ed. 603, n., 6th ed. 407, note *id.* If the declaration state how the suit was determined, the particular mode alleged must, if denied, be proved; Coombe *v.* Capron, 1 M. & Rob. 398. Termination by *stet processus* by consent; Wilkinson *v.* Howell, M. & M. 495. Sufficient if by rule of Court and payment of debt and costs; Brooke *v.* Carpenter, 3 Bing. 297; 11 Moor, 59; 2 Chit. Pl. 6th ed. 407, 408. Or by rule, &c. to discontinue; *id.* 408; Gadd *v.* Bennett, 5 Price, 540; Pierce *v.* Strut, 3 B. & Ad. 397; Bristow *v.* Heywood, 1 Stark. R. 48; 4 Camp. 213; Webb *v.* Hill, 3 C. & P. 485; M. & M. 253; Judge *v.* Morgan, 13 East, 547; Brandt *v.* Peacock, 3 D. & R. 2; 1 B. & C. 649. *Semble*, the mode in which the original action is determined need not be such as in itself shows a want of reasonable cause; see per Patteson, J., Norrish *v.* Richards, 3 Ad. & E. 737; 5 N. & M. 269; 1 H. & W. 437; see Wilkinson *v.* Howell, *supra*.

ment," as to judgments, &c. for defendants. *If the suit were determined by defendant not declaring within a year*, (*l*) *say*, "And the plaintiff further saith, that the defendant did not at any time after the said arrest declare in or prosecute his said suit according to the course and practice of the said Court, although the time for so doing elapsed before the commencement of this suit, but voluntarily permitted the said action to be discontinued, and for want of prosecution, the same, before the commencement of this suit, to wit, on [*&c.*], became and was and is wholly ended and determined." *If the defendant obtain a verdict, say*, "that such proceedings [*&c.*] that heretofore, to wit, on the —— day of —— A. D. ——, it was considered in and by the said Court that the defendant should take nothing by his said writ, but that he and his pledges to prosecute should be in mercy [*&c.*], as by the record and proceedings thereof remaining in the said Court fully appears and by means of the premises the said action was and is wholly ended and determined." *If the defendant were non-prossed, say*, "and the plaintiff further saith, that such proceedings [*&c.*] that the defendant did not prosecute his said action, but therein failed and made default, and thereupon afterwards, to wit, on [*&c.*], it was considered by the said Court that the defendant should take nothing by his writ, but that he and his pledges to prosecute should be in mercy, and that the said plaintiff should go thereof without day as by the record" [*&c.*], "and by means" [*&c.*], *as in last form.*] By means of which said several premises he the plaintiff during his said imprisonment suffered great pain and anxiety of body and mind, and was prevented from transacting his necessary affairs and business by him during that time to be performed; and thereby also the plaintiff necessarily incurred divers costs and expenses, (*m*) to wit, to the amount of £——, in and about the obtaining his release from the said arrest and imprisonment, and in and about the defending himself against the said action, and in and about other the premises, and by means of the premises the plaintiff was and is injured in his credit and circumstances, and otherwise greatly damnified; To the plaintiff's damage of £——, and therefore he brings his suit, &c.

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(*l*) Norrish *v.* Richards, 3 Ad. & E. 733. If no non pros. &c. in the original action, the defendant therein cannot sue for a malicious arrest till the expiration of the time for declaring, the action not being otherwise determined, *id.*

(*m*) It seems extra costs are not recoverable as damages; Sinclair *v.* Eldred, 4 Taunt. 7; Webber *v.* Nicholas, R. & M. 419; Jenkins *v.* Biddulph, 4 Bing. 160; *sed vide.* Sandback *v.* Thomas, 1 Stark. R. 306, where Lord Ellenborough held that costs as between attorney and client may be recovered.

2. *Case against the Plaintiff in a former Action, who having issued two concurrent Writs of Capias into different Counties, one of which was executed, neglected to countermand the Second Writ, whereby it was executed, &c.* (n)

For that whereas, before the times of the committing of the grievances by the defendant as hereinafter mentioned, the plaintiff had been indebted to the defendant in a certain sum of money, to wit, the sum of [£——] and being so indebted the defendant, for the recovery thereof, and for no other †cause of action or suit whatsoever, heretofore, and before the committing of the said grievances, to wit, on the —— day of —— A. D. ——, caused to be issued out of the Court of [*see* Form 1, *ante*, 431] a certain writ of our said lady the queen, called a writ of capias, against the plaintiff, directed to the sheriff of *Kent*, and dated at Westminster on the day and year aforesaid; by which said writ our said lady the queen commanded the said sheriff that [*&c. set out the writ, see ante*, 418, 419.] And which said writ the defendant then caused to be marked and indorsed for bail for [£100] according to the form of the statute in such case made and provided. And the defendant at the same time, to wit, on the day and year first mentioned, for the recovery of the said debt, and upon no other account, caused to be issued out of the said Court a certain other writ of our lady the queen, called a writ of capias, against the plaintiff, directed to the sheriff of *Surrey*, and dated at Westminster the day and year first aforesaid; by which said last mentioned writ [*&c. set out the second writ, see supra*], and the defendant then caused the last-mentioned writ to be indorsed for bail for £100 and upwards (being the debt aforesaid) according to the form of the statute in such case made and provided. And the plaintiff in fact saith, that the said two writs, so issued by the defendant as aforesaid, were issued by him and were in force concurrently at the same time and for the same identical cause of action; that is to say, the said sum of £100, so due from the plaintiff to the defendant, and the said writs having been so respectively indorsed for bail, were then respectively delivered by the defendant to the respective sheriffs of the said respective counties, to whom the same were severally directed as aforesaid, to be respectively executed in due form of law. And the plaintiff further saith, that after the said first mentioned writ was so delivered to the said sheriff of Kent, and before the return thereof, to wit, on the —— day of —— A. D. ——, the sheriff of the said county of Kent, within his bailiwick as such sheriff of Kent

(n) See Scheibel *v.* Fairbain, 1 B. & P. 392; Lewis *v.* Morris, 4 Tyr. 907; 2 C. & M. 712, S. C. It seems from these cases that actual malice is an essential ingredient in an action of the above nature. See form of declaration in Lewis *v.* Morris, (C. & M.) for neglecting to countermand a *ca. sa.* See the form of a declaration in case for refusing to receive a debt and costs for which plaintiff had been taken on a *ca. sa.*, and of which he made defendant a tender, and for refusing to direct the sheriff to discharge the plaintiff; Crozer *v.* Pilling, 4 B. & C. 26; 6 D. & R. 129, S. C. The same form is in 2 Chit. Pl. 5th ed. 606, 6th ed. 409.

as aforesaid, took and arrested the plaintiff by his body by virtue of the said firstmentioned writ, and then had and detained him in his custody as such sheriff as aforesaid, at the suit of the defendant, for the cause aforesaid; and thereupon the plaintiff then paid to the defendant and he received the whole of the said sum for which the plaintiff was so arrested as aforesaid, to wit, the said sum of £100, and also a further sum of money, to wit, the sum of £——, for and being the amount of the costs incurred by the defendant in and about the commencing and prosecuting the said action, and in full satisfaction (*o*) thereof; and thereupon the plaintiff was then discharged and released from the said arrest, of all which said several premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice; and thereupon it then became and was the duty of the said defendant to give notice of the premises to the said sheriff of Surrey, and instruct him not to arrest the said plaintiff on the said writ so directed to the said †sheriff of Surrey, and to take due care and proper precautions that the plaintiff should not be arrested on the said last-mentioned writ; and the defendant could, and might, and ought to have prevented the plaintiff from being again arrested for the said cause of action; yet the defendant, well knowing the premises, but contriving, and wilfully, and maliciously intending to injure the plaintiff, and to vex, harass, oppress, impoverish, and ruin him, and to put him to great expense of moneys, and not having then any reasonable or probable cause in that behalf, did not nor would give notice to the said sheriff of Surrey of the said arrest of the plaintiff by the said sheriff of Kent, or of the said payment so made by the plaintiff as aforesaid, or give notice to the said sheriff of Surrey, or instruct him not to execute the said writ so to him directed, or give notice to the plaintiff that the said writ so directed to the said sheriff of Surrey had been issued and was in force as aforesaid, or take other due or proper means or care or precaution to prevent the plaintiff from being arrested on the last-mentioned writ; but then wrongfully, carelessly, vexatiously, and maliciously neglected and refused so to do, although a reasonable time for so doing elapsed after the said payment and before the arrest hereinafter mentioned, and by reason of the several premises he the plaintiff was afterwards, and after he had so paid the said debt and costs as aforesaid, and before the commencement of this suit, to wit, on the —— day of —— A. D. ——, and within the bailiwick of the said sheriff of Surrey, arrested by such sheriff upon and by virtue of the said writ to him directed, according to the exigency thereof, and was thereupon imprisoned and kept and detained in prison for a long space of time, to wit, until [*&c. state the procuring bail, &c. according to the facts as in* Form 1.] By means [*&c. proceed and conclude as in* Form 1, *supra*, 565, *stating* "imprisoned as *last* aforesaid," *and* "*last-mentioned* arrest," *&c.*

(*o*) Of course this must correspond with the facts; see Form 1, *ante*, 564.

### 3. *Other Forms of Declarations for Malicious Proceedings in Actions and other Civil Proceedings.*

[For a malicious arrest without regard to a set-off; Austin *v.* Debnam, 3 B. & C. 139.

Against a client and his attorney for not releasing the plaintiff after satisfaction of debt and costs in an action; see Crozer *v.* Pilling, 4 B. & C. 26; 6 D. & R. 29; 2 Chit. Pl. 6th ed. 409, 5th ed. 606, S. P.

For malicious arrest in an inferior Court; Goslin *v.* Wilcock, 2 Wils. 302.

For maliciously causing the plaintiff to be outlawed; Drummond *v.* Pigou, 7 C. & P. 228; 2 Bing. N. C. 114; 1 Hodg. 190.

For arresting a privileged witness; Stokes *v.* White, 1 C. M. & R. 223.

For taking a party in execution upon a judgment on cognovit for more than was due; Wentworth *v.* Bullen, 9 B. & C. 840.

†For maliciously issuing a fiat in bankruptcy; see 2 Chit. Pl. 6th ed. 422, 5th ed. 617; Whitworth *v.* Hall, 2 B. & Ad. 695; Mellor *v.* Baddeley, 2 C. & M. 675; 4 Tyr. 962, S. C.; Hay *v.* Weakley, 5 C. & P. 861.]

## FOR MALICIOUS PROSECUTIONS OF A CRIMINAL NATURE. (*p*)

### 1. *For Maliciously causing the Plaintiff to be arrested and taken before a Magistrate for Felony, who remanded him, &c., and for finally exhibiting a Bill of Indictment against him, which was ignored.* (*q*)

For that whereas [*state general good character as in* Form 1, *ante*, 545,] yet the defendant, well knowing the premises, but contriving and intending to injure the plaintiff, heretofore, to wit, on [*&c.*] falsely and maliciously and without any reasonable or probable cause whatsoever, charged the plaintiff (*r*) with having feloniously stolen [a certain piece of lead]

(*p*) As to the law upon this subject, see in general the works referred to *ante*, 563, note (*d*). To support an action for an unfounded criminal prosecution, the plaintiff must show, 1st. The prosecution, and that defendant was prosecutor, and the unfounded nature and want of probable cause for the proceeding; 2ndly. Malice on the part of the prosecutor; 3dly. The legal termination of the prosecution in the plaintiff's favor; 4thly. Injury resulting from the prosecution, by imprisonment or expense, or (if the charge be of a nature calculated so to injure the plaintiff) prejudice to him in his reputation; *id.*; Bull. N. P. 13, 14; 2 Stark. Ev. 2nd ed. 496. The declaration must state all these points, and such of them as are denied by the defendant's pleas must be proved by the plaintiff at the trial; see the notes *ante*, 563, 564; and *post*, *Pleas*, tit. "Malicious Arrest."

(*q*) See precedents 2 Chit. Pl. 5th ed. 606 b, to 617, 6th ed. 411 to 422; 8 Went. 344, 346; Byrne *v.* Moore, 5 Taunt. 187; 1 Marsh. R. 12, S. C.; Elsee *v.* Smith, 1 D. & R. 97; 2 Chit. R. 304, S. C. and *post*, 570.

(*r*) This form was used in a case where a warrant was not procured before *arrest*.

of the goods and chattels of him the defendant, and upon such charge he the defendant then falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the plaintiff to be arrested by his body and to be taken in custody before ——, Esq., then being one of the justices of our lady the queen assigned to keep the peace of our said lady and also to hear and determine divers felonies, trespasses and misdemeanors committed in the said county, and then falsely and maliciously, and without any reasonable or probable cause, accused the plaintiff of the said crime before the said justice, and caused and procured the said A. B., so being such justice as aforesaid, to make and grant his certain warrant under his hand and seal for the remanding the plaintiff and committing him to a certain prison there, to wit, in the county aforesaid; and afterwards, to wit, on the day and year last aforesaid, caused and procured the said plaintiff, under and by virtue of the said warrant, to be imprisoned and kept and detained in prison for a long space of time, to wit, for the space of three days then next following, †and until he the defendant afterwards, to wit, on the —— day of —— A. D. ——, falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the plaintiff to be carried and conveyed in custody before the said A. B., so being such justice, to be examined before the said justice touching and concerning the said supposed crime; and then falsely and maliciously and without any reasonable or probable cause whatsoever, caused and procured the said justice to make his certain warrant under his hand and seal, and to remand the said plaintiff and commit him, to wit, by the said warrant under the hand and seal of the said justice, to a certain other gaol or prison, to wit, in the said county; and then falsely and maliciously, and without any reasonable or probable cause, caused and procured the plaintiff to be imprisoned and kept and detained in prison upon the said charge for a certain other long space of time, to wit, from the day and year last aforesaid, until and upon the —— day of —— A. D. ——, upon which last-mentioned day the plaintiff was again taken in custody upon the said charge before the said justice (*s*); and the defendant, further contriving and intending as aforesaid, then, to wit, on the day and year last aforesaid, falsely and maliciously, and without any reasonable or probable cause, caused the said justice to commit the plaintiff for trial to a certain other prison, to wit, Newgate, and procured the plaintiff to be imprisoned therein on the said charge until he was discharged as hereinafter mentioned; and the defendant, further contriving and intending as aforesaid, afterwards,

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If the arrest were upon a warrant, say that defendant falsely, &c. and without, &c. went before a justice, &c. and charged, &c. and thereupon falsely, &c. and without, &c. procured the justice to grant his warrant (setting it out, showing arrest thereon, &c); see forms in 2 Chit. Pl. &c. Evidence of charge and object in making it, &c.; Clarke *v.* Postan, 6 C. & P. 423; Rosc. Ev. 4th ed. 382; 2 Stark. Ev. 2d ed. 491.

(*s*) If the prosecution ended by the justice discharging the plaintiff, state the fact accordingly, as in 2 Chit. Pl. 5th ed. 606 b, 6th ed. 413.

to wit, on [*&c.*] at the general session of oyer and terminer of our said lady the queen, holden for the jurisdiction of the Central Criminal Court at Justice Hall in the Old Bailey, in the suburbs of the city of London, on that day, before [*copy caption of sessions*] falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured a certain bill of indictment (*t*) to be exhibited against the plaintiff for the said supposed offence; that is to say, [for that the plaintiff, on the —— day of ——, in the year of our Lord —— within the jurisdiction of the said Court, being servant to the defendant, then and there with force and arms feloniously did steal, take and carry away thirty pounds weight of lead, of the value of four shillings, of the goods and chattels of the defendant, the master and employer of the plaintiff, against the peace of our lady the queen her crown and dignity,] unto the jurors of the grand inquest there, to wit, unto certain good and lawful men of the jurisdiction aforesaid, qualified according to law, then there sworn and charged to enquire for our lady the queen for the jurisdiction aforesaid, and which said bill of indictment was then there returned to the said Court by the said jurors in form aforesaid, Not found(*u*); and the said prosecution was, to wit, on [*&c.*] being before the commencement of this suit and now is ended and determined; and thereupon the plaintiff afterwards, to wit, on [*&c.*] was discharged out of custody upon the said charge; by means of which said several premises, the plaintiff hath been and is injured in his good name, credit and reputation, and brought into public scandal and disgrace, and hath suffered great pain and anxiety of body and mind, and was prevented during the time he was so imprisoned from attending to and transacting his lawful and necessary affairs and business; and also by reason of the premises, the plaintiff necessarily incurred divers charges and expenses, to wit, to the amount of £——, in defending himself against the said prosecution and proceedings, and in relation to the premises, and in the manifestation of his innocence in that behalf, and was and is otherwise injured.

### 2.—*Other Forms for Criminal Prosecutions.*

[For a malicious charge before a justice, who discharged plaintiff; 2 Chit. Pl. 5th ed. 606 b, 6th ed. 411; Biggs *v.* Clay, 3 N. & M. 464.

For maliciously procuring, &c. a search warrant; 2 Chit. Pl. 5th ed. 612 b, 6th ed. 416; Hensworth *v.* Fowkes, 4 B. & Ad. 449; 1 N. & M. 321, S. C.

For maliciously procuring conviction before a magistrate; Mellor *v.* Baddeley, 6 C. & P. 374; 2 C. & M. 67; 4 Tyr. 962, S. C.

(*t*) If plaintiff were indicted before the petit jury and acquitted, see forms 2 Chit. Pl. 6th ed. 421.

(*u*) See Byrne *v.* Moore, 5 Taunt. 187; 1 Marsh. 12, S. C.

For maliciously exhibiting articles of the peace, &c.; 2 Chit. Pl. 5th ed. 612, 6th ed. 414; Venafra *v.* Johnson, 10 Bing. 307.

For a malicious prosecution of a court martial; Sutton *v.* Johnstone, 1 T. R. 493, 784.]

## MARKETS.

[Declaration for disturbance of a market by opening a new one; 2 Chit. Pl. 5 ed. 918; 6 ed. 583; and forms in cases there referred to; see also Mayor of Devizes *v.* Clark, 3 Ad. & E. 506.]

## MASTER AND SERVANT.

See "Carriages"—"Ships."

### 1. *Declaration for Debauching the Plaintiff's Daughter and Servant.*(*x*)

For that whereas the defendant, contriving and wrongfully intending to injure the plaintiff, heretofore, to wit, on [*&c.*] and on divers days and times after that day, and before the commencement of this suit, debauched and carnally knew E. F., being the daughter of the plaintiff, and who then and during all the time aforesaid was and yet is the servant of the plaintiff, whereby the said E. F. became pregnant and sick with child, and so continued for a long time, to wit, nine months, that is to say, until the —— day of ——, A. D. ——, when she was delivered of the

(*x*) The action may be in case or trespass, see *post*, Trespass; 1 Chit. Pl. 6 ed. 134. As to the law upon this subject, see generally Bac. Ab. Master and Servant, O.; 2 Stark. Ev. 2 ed. 721, tit. "Seduction;" Rosc. Ev. 4 ed. 466; 2 Harr. Index, tit. "Infant," VI. An action of this kind, founded on the supposed relationship of master and servant, is the only remedy provided by law for a parent for the seduction of his child. There must be some proof of the daughter's service of the slightest kind, or of her liability to serve, or at least, that she was living with her father as part of his family, and liable to his control and command; Stark. & Rosc. *supra;* Maunder *v.* Venn, M. & M. 324, per Littledale, J.; Harris *v.* Butler, 2 M. & W. 539, where see a form for seducing defendant's own apprentice. A contract to serve or payment of wages need not be shown; and the circumstance of the daughter being of age, or being at the time absent on a visit, is immaterial, if she intended to return home; *id.* But where the daughter was in the *service* of another person at the time of her seduction; Dean *v.* Peel, 5 East, 45; or was in the defendant's service; Harris *v.* Butler, *supra*, (unless he hired her for the purpose of seduction; Speight *v.* Oliviera, 2 Stark. R. 493;) no action lies for seduction, though the daughter returned home and occasioned expense, &c. Expense only will not suffice; the loss of service is in law the gist of this action. A master, though no relation; Fores *v.* Wilson, Peak. R. 55; or an aunt, or person who has adopted the party seduced, may be the plaintiff; see Edmonson *v.* Machell, 2 T. R. 4; Irwin *v.* Dearman, 11 East, 23. As to the evidence, &c. see Harrison, Roscoe, Starkie, &c. *ubi supra.*

child with which she was so pregnant, by means of which said premises the said E. F. was unable to do or perform the necessary affairs and business of the plaintiff, being her [father and] master as aforesaid, for a long time, to wit, from the day and year first mentioned hitherto, and the plaintiff during that time hath lost and been deprived of the services of the said E. F., and by reason of the premises the plaintiff necessarily incurred a great expense, to wit, to the amount of £——, in and about the nursing and taking care of the said E. F., and the delivery of the said child upon the occasion aforesaid, and incidental thereto; To the damage of the plaintiff of £——, and therefore he brings his suit, &c.

2. *For enticing away the Plaintiff's Workmen, employed by him in his Business, whereby he was unable to complete an Agreement, &c.* (y)

For that whereas, before the committing of the several grievances by the defendants as hereinafter mentioned, that is to say, on [*&c.*] by a certain agreement then made between the defendant E. F., of the one part, and the plaintiff of the other part, the plaintiff did agree with the said E. F. that he, the plaintiff, would weekly and every week from and after the —— day of —— then next ensuing, make for and sell, and deliver unto the said E. F. certain piano fortes of such number and description, and under such terms and conditions as are in the said agreement mentioned, and the said †E. F. did thereby then agree with the plaintiff that he the said E. F. would weekly and every week during the continuance of the said agreement, accept and take from the plaintiff such piano fortes, and should and would pay or cause to be paid unto the plaintiff the price or prices of such piano fortes as should be so made by the plaintiff and received by the said E. F. in pursuance of the said articles of agreement, at such rate and in such manner as therein mentioned, [*there was also a clause inflicting a penalty in case of default by either party,*] which said agreement, at the time of the committing of the said several grievances by the defendants as hereinafter mentioned, was and still is in full force, and whereas also, after the making of the said agreement, and before and at the time of the committing of the grievances by the defendants as hereinafter mentioned, divers persons, that is to say, A. R. [*&c.*] were the servants of the plaintiff in the way of his trade or business of a piano forte maker, by him then and still carried on; yet the defendants, well knowing the premises, heretofore, to wit, on [*&c.*] conspired, combined, confederated, and agreed together to injure, prejudice, and aggrieve the plaintiff in his aforesaid trade and business, and to deprive him of the services of the said A. R. [*&c.*] as such servants as aforesaid, and of the profits, benefits, and advantages which might and would otherwise have

(y) See common forms for enticing away and harboring apprentices, 2 Chit. Pl. 5 ed. 645; 6th ed. 455, 456.

arisen and accrued to him from the continuance of the said A. R. [*&c.*] in the said service of the plaintiff, and also wrongfully and unjustly to hinder and prevent the plaintiff from performing the said agreement in matters on the part of the plaintiff to be performed, and to deprive the plaintiff of the gains and profits which he might and would have derived and acquired from performing the same, and also to subject the plaintiff to the payment of divers large sums of money, to be recovered against him as and by way of damages for the non-performance of the said agreement, and the plaintiff further saith, that the defendants, in pursuance of their said unlawful conspiracy, confederacy, and agreement, afterwards, to wit, on the day and year last aforesaid, unlawfully, wrongfully, and unjustly enticed, persuaded, and procured the said A. R. [*&c.*], so then being the servants of the plaintiff as aforesaid, to depart from and out of the service of the plaintiff, that is to say, by unlawful and unjust means and devises, that is to say, by then, to wit, on the day and year last aforesaid, causing and procuring the said A. R. [*&c.*] so then being the servants of the plaintiff as aforesaid, to be furnished and supplied with meat, drink, and entertainment, and giving and paying to each of them a large sum of money, to wit, £1, as a premium and reward for their and each of their unlawfully and unjustly, and without the license or consent, and against the will of the plaintiff, departing from and out of the service of the plaintiff, and also by then promising and agreeing with the said servants of the plaintiff and each of them to retain and employ them and each of them in the service of the defendants, for certain large wages and reward, †to be paid by the defendants to each of them the said A. R. [*&c.*] so being the servants of the plaintiff; and also by then falsely and fraudulently representing to the said servants of the plaintiff, that he the plaintiff would be unable to pay to them or either of them their or either of their lawful wages and reward for the services to be performed by them respectively as such servants of the plaintiff, by means of which said enticement, persuasion, and procurement the said A. R. [*&c.*] so being such servants of the plaintiff as aforesaid, then, to wit, on the day and year last aforesaid, unlawfully, wrongfully, and unjustly, and without the license or consent and against the will of the plaintiff, departed from and out of the service of the plaintiff, and have and each of them hath remained and continued absent from such service, to wit, from thence until the commencement of this suit, whereby the plaintiff hath for and during all that time lost and been deprived of the services of the said A. R. [*&c.*] and each of them in his said trade and business, and of all the profits, benefits, and advantages which might and would otherwise have arisen and accrued to him from such services, and by means of the several premises the plaintiff hath been hindered and prevented from performing the said agreement on his part and behalf to be performed, and from making, selling, and delivering the said piano fortes according to the said agreement as he otherwise might and would have done, and

hath wholly lost and been deprived of divers great gains and profits which he might and would have derived and acquired from making, selling, and delivering the said piano fortes, and from performing the said agreement, and hath been and is subjected to a claim against him for the non-performance thereof, and also by means of the premises the plaintiff hath been and is greatly injured in his said trade and business and otherwise. (z)

### 3. *By the Proprietor of an Omnibus against the Driver, his Servant, for Injuring one of the Horses by careless Driving.* (a)

For that whereas the plaintiff, heretofore, to wit, on [*&c.*] retained and employed the defendant, at his request, for reward to him, to drive and manage a certain carriage, to wit, an omnibus, and divers, to wit, two horses of the plaintiff, for him the plaintiff, and as his servant, and the defendant, by virtue of such retainer, then drove and managed and had the charge of the said carriage and horses, and thereupon it then became and was the defendant's duty to drive and manage the said carriage and horses †in a careful and proper manner, and to take due and reasonable care thereof whilst he so had the charge of the same, yet the defendant then drove and managed the said carriage and horses in a careless and improper manner and did not take due or reasonable care thereof, and by reason of the carelessness, improper conduct, and breach of duty of the defendant in the premises, one of the said horses, being of great value, to wit, £40, then became and was greatly cut, bruised, and wounded, and injured, and one of its legs then became and was fractured and broken, and the said horse was rendered and is of no use or value to the plaintiff, and thereby he hath lost divers gains and profits which would otherwise have accrued to him from the use of the said last-mentioned horse, and thereby also the plaintiff then incurred divers expenses, to wit, £——, in having the said horse examined and taken care of [and in hiring another horse in lieu thereof for a long time, to wit, from thence hitherto]; To the damage of the said plaintiff of £——, and therefore he brings his suit.

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(z) There were several other counts more general, referring only to the agreement in the first count, and not stating the mode of persuasion, and for harboring, &c.; and other counts (not noticing the agreement) for enticing and harboring. There was also a count for a conspiracy to entice, stating that in pursuance thereof defendants, enticed, &c. The declaration was drawn by an eminent pleader. Plaintiff recovered a verdict and very large damages.

(a) See Forms, *ante*, 48 to 55.

## MISCHIEVOUS ANIMALS.

### 1. *For keeping a ferocious Dog, or suffering it to go at large, which attacked and injured the Plaintiff.* (*b*)

For that whereas the defendant, before and at the time of the damage and injury to the plaintiff hereinafter mentioned, wrongfully and injuriously kept a certain dog, he, the defendant, then well knowing that the said dog then was used and accustomed to attack and bite mankind [*or* "knowing that the said dog then was of a fierce, ferocious, and mischievous nature, and that it was dangerous and improper to allow the said dog to go at large and unconfined, * and not properly secured,"] and which said dog, whilst the defendant kept the same, to wit, on the —— day of ——, A. D. ——, did attack, bite, wound, and injure the plaintiff, [*or, if the allegation between the brackets be inserted, instead of the averment that the dog was used to attack mankind, say from the asterisk,* "yet the defendant, whilst he kept the said dog as aforesaid, to wit, on [*&c.*] wrongfully, carelessly, and improperly suffered the said dog to go at large and unconfined, without being properly secured and without taking due and proper care or precautions to secure the same in that behalf, and which said dog did then attack, bite, wound, and injure the plaintiff,"] and thereby the plaintiff became and was †sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, and thereby the plaintiff became and was during all that time unable to do or perform his necessary affairs and business, and also by means of the premises the plaintiff then incurred divers expenses, costs, and charges to a large amount, to wit, to the amount of £——, in and about the endeavoring to get cured of the said wounds, injuries, sickness, lameness, and disorder so occasioned as aforesaid and incidental thereto, and the plaintiff hath been and is by means of the premises otherwise greatly damnified; To the damage of the plaintiff of £——, and therefore he brings his suit, &c.

### 2. *For Injuries occasioned by Defendant's Ox running at the Plaintiff.*

For that whereas the defendant, heretofore, to wit, on [*&c.*] was possessed of a certain ox, and then by his servants in that behalf had the

(*b*) See forms, &c. 2 Chit. Pl. 5 ed. 596; 6 ed. 401, 402; Hartley *v.* Harriman, 1 B. & Ad. 620; Curtis *v.* Mills, 5 C. & P. 489; see in general 1 Chit. Pl. 6 ed. 82, 133; Rosc. Ev. 4 ed. 351; Burn J. tit. Dogs; Harr. Ind. tit. Case, VII. The *scienter*, which is put in issue by the plea of not guilty, is the gist of the action, *id.*; Thomas *v.* Morgan, 2 C. M. & R. 496; 4 Dowl. P. C. 223; 1 Gale, 172. As to *evidence*, see *id.*; Rosc. and Harr. Ind. See further *post, Pleas.*

care and management of the said ox; and whereas the said ox, before and at the time of the committing of the grievance hereinafter mentioned, was wild and vicious, and it was then unsafe and improper to drive, or permit, or suffer the said ox to go through any public highway, without causing or procuring the same to be tied down and confined, or otherwise secured, so as to prevent the said ox from doing mischief or damage to any person or persons passing along or being in such highway; of all which the defendant before and at the time of the committing of the grievance hereinafter mentioned had notice: yet the defendant then wrongfully, injuriously, carelessly, negligently and improperly, by his said servants, drove, and caused and procured to be driven, the said ox, so being wild and vicious as aforesaid, in a certain highway, wholly untied, unbound and unconfined, and not properly secured, and without taking due and proper care in that behalf, by means whereof the said ox then, with great force and violence, ran at and against the plaintiff, who was then passing in and along the said highway, and then tossed, threw down and greatly bruised, hurt and wounded the plaintiff, insomuch that by means thereof he, the plaintiff, then became and was sick [*&c. proceed as in* Form 1.

## NEGLIGENCE.

See "Carelessness."

## NUISANCES. (*c*)

See "Ancient Windows," "Common," "Reversion," "Watercourses," "Ways."

### †1. *For not using due Care in pulling down a House adjoining the Plaintiff's House, whereby the latter was injured, &c.* (*d*)

For that whereas the plaintiff, before and at the time of the commit-

(*c*) See in general 9 Co. 53 b, 59 a; Com. Dig. "Action on the Case for a Nuisance;" Bac. Ab. tit. "Nuisance;" 3 Bla. C. 208 to 309; 1 Chit. Gen. Pr. tit. "Nuisance;" Harr. Ind. tit. "Case, Action of;" Rosc. Ev. 4th ed. 336 to 340, VII. VIII.; 2 Chit. Pl. Index, Nuisances. How to state the injury; Fitzsimons *v.* Inglis, 5 Taunt. 534; King *v.* Williamson, 1 D. & R. C. N. P. 35; 1 Chit. Pl. 6th ed. 384, 388. Form of action; *id.* 6th ed. 133—139. Parties to the action; *id.* 65—83; Harr. Ind. *supra*. Evidence, Rosc. 336. A person letting premises with a nuisance *then* thereon, and receiving rent, is liable for the continuance of the nuisance; Rex *v.* Pedly, 3 N. & M. 627; 1 Ad. & E. 822. The venue is local; Warren *v.* Webb, 1 Taunt. 379; 1 Chit. Pl. 6th ed. 268; and the declaration should show in the body in what county the premises lie; see *ante*, 2, note (*d*).

(*d*) It is satisfactorily settled that it is a good cause of action that a next neighbor

ting of the grievances hereinafter mentioned, was possessed of a certain house, situate in the county aforesaid, and occupied the same and resided therein, and just before and at the times of the committing of the grievances hereinafter mentioned, the defendant was about to pull down, and prostrate, and remove, and did pull down, and prostrate, and remove a certain other house, situate in the county aforesaid and next adjoining the said house of the plaintiff; and thereupon it became and was the duty of the defendant to use due care and skill and take due, reasonable and proper precautions in and about the pulling down, and prostrating, and removing the said house so adjoining the plaintiff's said house, so that for want of such care, skill and precautions, the said house of the plaintiff and his goods and chattels therein might not be damaged or destroyed, or the plaintiff injured in respect thereof; yet the defendant, not regarding his duty in that behalf, but contriving and intending to injure the plaintiff, did not nor would use due care or skill, or take due, reasonable or proper precautions in or about the pulling down, prostrating or removing the said house so adjoining the said house of the plaintiff upon the said occasion, according to his said duty; and the defendant, contriving and intending as aforesaid, heretofore, to wit, on [*&c.*], and †on divers other days and times afterwards, and before the commencement of this suit, wrongfully and injuriously pulled down and prostrated divers parts of the said house so adjoining the said house of the plaintiff, upon the said occasion, in a careless, unskilful and improper manner, and behaved and conducted himself carelessly, unskilfully and improperly in that behalf, and by reason of the several premises the said house of the plaintiff became and was greatly shaken and weakened and injured; and afterwards, to wit, on [*&c.*] gave way and fell in, and became and was greatly injured and in part destroyed, and rendered uninhabitable; and

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conducts himself so *carelessly, negligently* and *unskilfully* in pulling down his own house, &c. as to injure thereby his neighbor's house; although the complainant may not in respect of the latter house have acquired any absolute right to the support of the building pulled down or the adjoining soil; see Trower *v.* Chadwick, 3 Bing. N. C. 334. The above form is framed in substance from the declaration in that case (which was settled in consultation with an eminent counsel). See the earlier cases upon this point, Peyton *v.* Mayor of London, 9 B. & C. 725; 4 M. & R. 625; particularly Dodd *v.* Holme, 1 Ad. & E. 493; 3 N. & M. 739; Plant *v.* James, 5 B. & Ad. 791; see a form (*semble, too general*) in Lloyd *v.* Wigney, 6 Bing. 489. And it seems that if the defendant has been guilty of actual negligence and thereby occasioned the injury, he is liable, although the plaintiff himself did not use those precautions he ought to have adopted against such injury; Walters *v.* Pfeil, M. & M. 362. The damages should be to the amount of the value of the plaintiff's old house thrown down by defendant's carelessness, and not the whole expense of building a new one; Lukin *v.* Godsall, Peak. Add. C. 15; see Dodd *v.* Holme It is not settled whether a party about to pull down his house is bound to give notice of his intention to his next door neighbor (who has not acquired a legal right to the support of the house, &c.) if he does not shore up his neighbor's house; see Peyton *v.* Mayor of London, *supra*; Massey *v.* Goyder, 4 C. & P. 161; and per *Tindal*, C. J. in Trower *v.* Chadwick, 3 Bing. N. C. 353. In order to raise this question, the declaration should specially charge the omission to give notice, and the pulling down without shoring up; see form, *id*, 337, 8. See a form of declaration against commissioners of sewers for undermining the plaintiff's house by improperly making a sewer, The Grocers' Company *v.* Donne, 3 Bing. N. C. 34. As to the *right* to the *support* of adjoining property, see *post*, 557, note (*s*).

by reason of the several premises, divers goods and chattels of the plaintiff, to wit, —— of great value, to wit, £—— became and were broken, spoiled, and destroyed, and thereby also the plaintiff has from thence hitherto lost and been deprived of the use of his said house, and of the profits, benefits and advantages which he otherwise might and would have acquired from the possession and use thereof; and thereby also the plaintiff has necessarily incurred divers expenses, to wit, to the amount of £——, in having his said house examined and surveyed, and the nature and extent of the said damages, injuries and losses ascertained, and in and about the removal of the ruins of the said house, and of such of his said goods and chattels as were not wholly destroyed, and in and about the removal of the said last-mentioned goods and chattels, and in and about the procuring another residence, and in and about the rebuilding his said house, and otherwise in relation to the premises and matters aforesaid, and was and is otherwise injured; To the damage, &c.

2. *For pulling down a House adjoining the Plaintiff's, and disturbing the Foundations of Plaintiff's House, (he being entitled to the support of such adjoining House and Foundations), without shoring up Plaintiff's House, &c.* (*e*)

For that whereas the plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was possessed of a certain dwelling-house situate in the county aforesaid, and occupied the same, and resided therein; and whereas, before and at the times of the committing of the grievances by the defendant as hereinafter mentioned, the plaintiff's said house adjoined a certain other house situate in the county aforesaid, whereof the defendant then was possessed, and in part of right rested upon and was of right in part supported by parts of the said adjoining house; and the plaintiff, before and at and during those times, was of

(*e*) The above is framed from the form of declaration adopted in Trower *v.* Chadwick, cited *ante*, 576, note (*d*). The defendant, in Trower *v* Chadwick, pleaded some defective pleas, which were demurred to; and upon the argument, the defendant's counsel objected to the declaration, but the Court decided that it was good. *Tindal*, C. J., in delivering judgment, said, "The count contains a clear and substantial ground of action, and that if the defendant meant to object that the plaintiff's right and title were not alleged with sufficient certainty he ought to have demurred specially to the declaration, instead of pleading over." The allegation in reference to the plaintiff's right to the support of the adjoining soil as a foundation for his house, was mainly founded on the form, &c. in Brown *v.* Windsor, 1 C. J. 20. Where the declaration does not show that the plaintiff's house was ancient, or that he had acquired a right to have it supported by the adjoining wall or soil, and merely charges (without laying negligence, &c. see Form 1, *supra*) that defendant dug into the soil and foundation of the adjoining land *so near* the plaintiff's house that it fell, &c., it is defective; see Wyatt *v.* Harrison, 3 B. & Ad. 871; Dodd *v.* Holme, 1 Ad. & E. 493; 3 N. & M. 739, S. C. For it appears that where a party has not acquired an absolute right to such support for his house by 20 years uninterrupted enjoyment thereof, or other legal means, his neighbor may dig into or use his own soil to the extremity thereof, without shoring up the house, and is not liable (reasonable care and skill being used) although such house fall down; see *id.*

right entitled that his said house should so in part rest upon and be so supported in part by the said parts of the said adjoining house, without the hindrance or disturbance of any person; and whereas, before and at the times of the committing of the grievances hereinafter in this count mentioned, there were certain foundations belonging to and supporting the said house of the plaintiff, and he of right had enjoyed, and then of right ought to have enjoyed, and still of right ought to enjoy such foundations and the benefit and advantage thereof for the support of his said house without the hindrance or disturbance of any person; Yet the defendant, well knowing the premises, but contriving and intending to injure the plaintiff, heretofore, to wit, on [*&c.*] and on divers other days and times afterwards and before the commencement of this suit, wrongfully and injuriously took down, pulled down, and removed, and caused and procured to be taken down and removed, the said house so adjoining the said house of the plaintiff, by which the said last-mentioned house was so in part supported as aforesaid, without shoring up, propping up, or securing or taking other reasonable and proper precautions to support or secure, or shore up the said house of the plaintiff, so as to prevent the same from giving way or being weakened or damaged or destroyed on that occasion; and also then wrongfully and injuriously dug, and made, and caused and procured to be dug and made, divers excavations in the earth near to the said foundations of the said house of the plaintiff, and loosened, weakened and disturbed such foundations, without taking due and proper precaution to prevent the said foundations from being weakened and injured and giving way, and by reason thereof the said foundations then became and were injured, loosened and weakened, and by reason of the said several premises, the said house of the plaintiff then became and was greatly weakened and injured; and by reason of the said several premises in this count mentioned, the said house of the plaintiff afterwards, to wit, on [*&c.*] aforesaid, gave way and fell in, and became and was greatly injured and destroyed; and by reason of the several premises divers goods [*&c. proceed and conclude as in last form.*

†3. *Against Persons employed in making a Railway and Aqueduct, for carelessness, &c. in performing the Works, whereby Plaintiff's land was injured.(f)*

For that whereas, before and at the times of the committing of the grievances by the defendants hereinafter mentioned, the plaintiff was, and thence hitherto hath been, and still is lawfully possessed of divers, to wit, —— acres of land, with the appurtenants, situate in the county aforesaid; and whereas also, before and at the times of the committing of the grievances by the defendants hereinafter mentioned, they, the de-

(*f*) See 1 Chit. Pl. 6th ed. 76, 77; The Grocers' Company *v.* Donne, 3 Bing. N. C. 34.

fendants were engaged in the making of a certain part of a certain intended railway near to and across part of the said lands so possessed by the plaintiff as aforesaid, and were also then employed in cutting a certain aqueduct through and across a certain high road leading from —— to ——, and which said high road intersected and ran between a certain part of the said lands so possessed by the plaintiff and certain land covered with water, and called the Fleet Pond, and a certain other part of the said lands so possessed by the plaintiff, being also land covered with water, and called the Lower Pond, and in laying in a certain trunk from the said Fleet Pond to the said Lower Pond, and in filling up and covering in the said aqueduct so cut by the defendants as aforesaid; yet the defendants, well knowing the premises, but contriving and wrongfully and injuriously intending to injure the plaintiff in respect of the occupation of the said lands whereof he was so possessed, afterwards, and whilst the plaintiff was so possessed as aforesaid, to wit, on [*&c.*] and on divers other days and times between that day and the —— day of —— A. D. ——, so carelessly, negligently, unskilfully, inartificially, improperly and insufficiently cut the said aqueduct and laid in the said trunk from the said Fleet Pond to the said Lower Pond, and filled up and covered in the said aqueduct, and kept and continued the said several works from the times of the respective doings and performings thereof until the day and year last aforesaid, so carelessly, negligently, unskilfully, inartificially, improperly and insufficiently done and performed as aforesaid, that afterwards, to wit, on the said —— day of —— in the year aforesaid, by reason of the careless, negligent, unskilful, inartificial, improper and insufficient manner in which the said several works were respectively done and performed and kept and continued as aforesaid, the waters then being in the said Fleet Pond, broke through the said works of the said defendants unto and into the said Lower Pond, and from thence mingled and aided with and by the waters of the said Lower Pond, wrongfully and with great force and violence, overflowed divers, to wit, —— acres of meadow land, and —— acres of pasture land respectively, parcel of the said land so possessed by the plaintiff as aforesaid, and staid and continued in and upon the same respectively for a long space of time, to wit, —— months then following; and during that time washed up, tore up, and subverted divers, to wit, 500 trees, and divers, to wit, 20 perches of hedges of the plaintiff there then growing and being, and by reason of which said overflowing, not only were the ditches and drains of the plaintiff on his said lands then being greatly choked up, and the said lands greatly saturated with water, and dirtied and injured with and by a sandy deposit thereupon thereby brought and occasioned, and otherwise much lessened in value; and the plaintiff was thereby hindered and prevented from and lost the season for cultivating the same as he otherwise might and would have done, but also divers great quantities, to wit, —— of manure of the plaintiff there then lying, of great value, to wit, of the value of £——, were wholly

washed away, consumed and destroyed, and the plaintiff hath been and is thereby otherwise greatly injured.

4. *Against a Person who had contracted to lay down Gas Pipes in a Highway, for leaving the Road in an insecure state, whereby Plaintiff's Horse was injured.* (*g*)

For that whereas before and at the times of the committing of the grievances hereinafter in this count mentioned, the defendant had taken upon himself to put and lay down certain pipes in and under a certain public and common king's highway in the county aforesaid, for the purpose of lighting the said highway and other places adjacent with gas, and to take up part of the said highway, and make certain trenches therein for the purpose aforesaid, and when such pipes were laid down, to fill up, ram down, and level in a proper manner the said trenches, and also to level in a proper manner such parts of the earth and materials of the said highway as he should have disturbed and displaced in doing the said works, and to put and leave the said highway in a reasonably secure and proper state and condition, in order that persons, and carriages, and horses, lawfully passing in and along the said highway might not be injured in that behalf; and the defendant heretofore, to wit, on [*&c.*], accordingly took up part of the said highway, and made divers trenches and holes therein, and laid down therein the said pipes upon the occasion aforesaid, and then much disturbed and displaced the earth and materials of the said highway, and by reason of the premises, before and at the times of the committing of the grievances hereinafter mentioned, it became and was the defendant's duty to use due and reasonable care, dilligence, and skill, and to adopt due and proper precautions in and about the filling up, ramming down, and levelling in a proper manner the said trenches, and levelling such parts of the earth and materials of the said highway as the defendant disturbed and displaced in performing the said †works as aforesaid, and in putting and leaving the said highway in such reasonably secure and proper state and condition as aforesaid; Yet the defendant, not regarding his said duty, but contriving and intending to injure the plaintiff, did not nor would use such due and reasonable care, diligence, or skill, or adopt such due and proper precautions in and about the filling up, ramming down, and levelling the said trenches, and levelling in a proper manner such parts of the earth and materials of the said highway as the defendant disturbed and displaced in performing the said works as aforesaid, and in putting and leaving the said highway in such reasonably secure and proper state and condition as aforesaid; and the defendant then, to wit, on

(*g*) The plaintiff obtained a verdict in the action in which this form was used. Declaration against a company for leaving pavement in an improper condition; Drew *v.* New River Company, 6 C. & P. 754.

the day and year last aforesaid, wrongfully and injuriously made default in the premises, and put and left the said part of the said highway in a dangerous, insecure, loose, soft, rotten, and improper state and condition, and without any warning that the same was in such state and condition; and by reason thereof a certain horse of the plaintiff of great value, to wit, £—— which he was then lawfully driving in and along the said highway, then sunk into the said part of the said highway, and was entangled therein and fell down, and became and was cut, lacerated, wounded, and greatly injured, disabled, disfigured, and lamed and rendered of little or no use or value; and thereby the plaintiff from thence hitherto hath been and yet is deprived of the use of the said horse, and hath incurred divers expenses, to wit, to the amount of £——, in having the said horse examined, kept, and taken care of, and in endeavoring to cure the said horse of the said injuries, and is otherwise damnified.

### 5. *For working a Steam-Engine and keeping up large Fires in a Building adjoining Plaintiff's Premises, &c.*

For that whereas before and at the times of the committing the grievances hereinafter mentioned, the plaintiff was and thence hitherto hath been and still is lawfully possessed of a certain messuage or dwelling-house and premises with the appurtenants, situate in the county aforesaid, and resided and still resides therein with his family, and carried on and still carries on therein the trade and business of a ——; and whereas the defendant, before and at the times of the committing the grievances hereinafter next mentioned, was, and from thence hitherto hath been and still is possessed of a certain building near to and *adjoining* the said tenements of the plaintiff; Yet the defendant, contriving and wrongfully and unjustly intending to injure the plaintiff in this behalf, whilst the plaintiff was so possessed of his said tenements, and so resided and dwelt and exercised and carried on his said trade and business therein as aforesaid, to wit, on [*&c.*], and on divers days and times after that day and before the commencement of this suit, wrongfully, unlawfully, and unjustly, without the license or consent and against the will of the plaintiff, erected and built a certain steam-engine, and also divers other engines, and divers mills and machines, to wit, twenty other engines, ten mills, and twenty machines for the grinding and manufacturing of [drugs] and other substances in the said buildings of the defendant, and there wrongfully and injuriously kept and continued the same so there erected and built for a long time, to wit, thence hitherto, (*h*) and then, to wit, on the said —— day of —— A. D. ——, and on divers other days and times after that day and before the commencement of this suit, wrongfully, unlawfully, and unjustly, and without the consent of the plaintiff, there worked and used,

(*h*) Or if the plaintiff were not the original erector of the engine, &c., see Form 2, *ante*, 499.

and caused and procured to be worked and used the said steam-engine, and the said other engines, mills, and machines, and in so doing on the several days and times, aforesaid wrongfully, unlawfully, and unjustly made and caused and procured to be made divers loud, horrible, discordant and tremendous sounds, and noises, and vibrations, and greatly shook the said messuage or dwelling-house and premises of the plaintiff and the foundations thereof, and the furniture, effects, goods, and chattels of the plaintiff therein being; and also, to wit, on the several days and times aforesaid, wrongfully, unlawfully, and unjustly made and kept, and caused and procured to be made and kept up divers large and dangerous fires, at and in the said buildings of the defendant, for the purpose of working and using the said steam and other engines, mills, and machines of the defendant there, by means of which said several premises the said messuage [*&c.*] of the plaintiff became and were on those several days and times greatly disjointed, broken, damaged, and in great and imminent danger of falling and tumbling down; and a part of the said furniture, goods and chattels of the plaintiff, to wit, [*describe them*], of great value, to wit, of the value of £——, being therein, thereby became and were greatly injured, damaged and spoiled, and by means of the aforesaid premises and the smoke, vapors and filth arising from the said fire, and which entered and impregnated the air in the said tenements of the plaintiff, he the plaintiff and his family were greatly disturbed and disquieted, incommoded, interrupted and annoyed in the peaceable and quiet possession, use, occupation and enjoyment of his said messuage [*&c.*], insomuch that by means thereof the health of the plaintiff was and is greatly impaired and injured, so that it became and was unsafe, incommodious and unfit for the plaintiff to reside or dwell any longer with his family, or to exercise or carry on his said trade and business at or in his said messuage [*&c.*]; and thereupon he the plaintiff was forced and obliged to and did, to wit, on [*&c.*], of necessity quit the same, and go and reside with his family, and exercise and carry on his said trade and business elsewhere, and the said messuage [*&c.*] became and were, and from thence hitherto have been and still are empty and unoccupied; and †the plaintiff hath thereby not only lost and been deprived of all the profits, benefits and advantages which might and would otherwise have accrued to him from and in respect of the said messuage [*&c.*], but hath been put to great trouble, inconvenience and expense in and about the procuring another residence for himself and his family, and the exercise and carrying on his said trade and business, and in and about his said removal to such other residence, and the fitting up thereof and making the same commodious and convenient for the purpose aforesaid; and the plaintiff hath been and is by means of the premises aforesaid otherwise greatly injured, and put to great additional and otherwise unnecessary trouble and expense in and about the exercising and carrying on of his said trade and business.

[†583]

### 6. *Other Forms for Nuisances, &c.*

[For manufacturing candles near a dwelling-house ; 2 Chit. Pl. 5th ed. 773, 6th ed. 544.

For keeping a slaughter-house near plaintiff's school ; 2 Chit. Pl. 5th ed. 775, 6th ed. 545.

For a noisy nuisance in manufacturing iron ; Elliotson *v.* Tatham, 2 Bing. N. C. 134.

For not repairing privy adjoining plaintiff's house ; 2 Chit. Pl. 5th ed. 771, 6th ed. 542, 543.

For erecting a mound, &c. on a hill above plaintiff's house, whereby it was unsafe, &c. ; Norris *v.* Daniell, 4 M. & Scott, 383.

For undermining plaintiff's house ; The Earl of Lonsdale *v.* Littledale, 2 H. Bla. 267 ; The Grocers' Company *v.* Donne, 3 Bing. N. C. 34.

For erecting adjoining house so that it projected over the plaintiff's, and the rain, &c. fell thereon ; 2 Chit. Pl. 5th ed. 776 a, 6th ed. 546 ; see Thomas *v.* Thomas, 1 Gale, 61 ; 2 C. M. & R. 35, S. C.

For leaving a cellar door uncovered, whereby plaintiff fell in, &c. ; 2 Chit. Pl. 5th ed. 599 a, 6th ed. 403 ; see Rosc. Ev. 4th ed. 353 ; Coupland *v.* Hardingham, 3 Campb. 398 ; Proctor *v.* Harris, 4 C. & P. 337 ; Daniells *v.* Potter, 4 C. & P. 262 ; Jarvis *v.* Dean, 11 Moor, 354 ; see *post*, "Ways."

For leaving a mine uncovered, whereby plaintiff's horse fell in ; Sybray *v.* White, 1 M. & W. 435.

For setting spring guns ; 7 & 8 Geo. 4, c. 18, s. 1 ; Forms, Ilott *v.* Wilkes, 3 B. & Al. 304 ; Bird *v.* Holbrook, 4 Bing. 628 ; 1 M. & P. 607. Dog spears, &c. Deane *v.* Clayton, 2 Marsh. 577 ; 1 Moor, 203 ; 7 Taunt. 489 ; Sears *v.* Lyon, 2 Stark. R. 317 ; Townshend *v.* Walker, 9 East, 277.

For injury by a gun being entrusted to an unfit person ; Dixon *v.* Bell, 5 M. & Sel. 198 ; 1 Stark. R. 287, S. C.

Other Forms, 2 Chit. Pl. Index, "Nuisances."]

## †PATENTS. (*i*)

### *By the Assignee (k) of Letters Patent, who had disclaimed (l) part of the Invention, for various infringements of the Patent.*

For that whereas a certain person, to wit, S. P. before and at the time of the making of the letters patent hereinafter mentioned, was the true

(*i*) As to the law upon this subject, see the Treatises by Godson, Davies, and Smith ; 2 Chit. Commerce, 192 to 212 ; Har. Ind. and Add. tit. "Patent ;" Chit.

and first inventor of certain improvements in —— and thereupon heretofore, to wit, on &c., by certain letters patent of his late Majesty King William the Fourth, bearing date at Westminster the day and year last aforesaid, under the Great Seal of Great Britain, and which said letters patent the plaintiff now brings here into Court, after reciting that [*set out the recital, the grant, the clauses prohibiting infringement, the proviso requiring a specification, and the clause as to the construction to be put upon the grant, fully in the past tense*] as by the said letters patent fully appears; And the plaintiff further saith, that the said S. P. did afterwards and within [*six*] months next and immediately after the date of the said letters patent, to wit, on [*&c.*] in pursuance of the said letters patent, by an instrument in writing, to wit, a specification, under his hand and seal particularly describe and ascertain the nature of his said invention, and in what manner the same was to be and might be performed; and did afterwards and within [*six*] calendar months next and †immediately after the date of the said letters patent, to wit, on [*&c.*] cause the said instrument in writing to be inrolled in his said late Majesty's High Court of Chancery at Westminster, in the county of Middlesex, [which said instrument in writing or specification was and is as follows: (*m*) "To all to whom these presents shall come, I, S. P., of [*&c.*] send greeting,

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& Hulm. Coll. of Statutes, tit. "Patent," "Copyright;" *post*, *Pleas*, tit. "Patent;" and the late cases of Cornish *v.* Keane, 3 Bing. N. C. 570, and Morgan *v* Seaward, 2 M. & W. 544. By 5 & 6 Will. 4, c. 83, s. 1, any person having obtained letters patent for any invention, may enter a disclaimer of any part of his specification, or a memorandum of any alteration therein, which, when filed as therein mentioned, shall be deemed part of such specification; and that section provides, that a caveat may be entered as heretofore, that the disclaimer shall not affect actions pending at the time, and that the attorney-general may require the party to advertise his claim. The 2d sect. points out the mode of proceeding where the patentee is proved not to be the real inventor, though he believed himself to be so. By the 3d section, if in any action or suit respecting an infringement, a verdict or decree shall pass for the patentee, the judge *may* grant a certificate that the validity of the patent came in question, which being given in evidence in *any other action* or suit touching such patent, the patentee, if he have a verdict or decree, shall have *treble costs*, to be taxed at three times the taxed costs, unless the judge in such second action shall certify he ought not to have treble costs. The 4th section points out the mode of proceeding in case of application for the prolongation of the term of a patent. The 5th section enacts that the defendant shall give notice of the objections, &c. he means to rely upon (see Pleas and form of notice, *post*, Pleas, tit. "Patent"). The 6th section provides that in taxing costs in actions for infringement "regard shall be had to the part of such case which has been proved at the trial, which shall be certified by the judge before whom the same shall be had; and the costs of each part of the case shall be given according as either party has succeeded or failed therein, regard being had to the notice of objection, as well as the counts in the declaration, and without regard to the general result of the trial." The 7th section inflicts a penalty for using without authority the name of a patentee, &c. (see as to fraud of this kind, *ante*, 538, note (*y*).) In Perry *v.* Skinner, 2 M. & W. 471, it was held, that where a patent is originally void, but amended under the above statute by filing a disclaimer of part of the invention, that act has not a retrospective operation so as to make a party liable for an infringement of the patent *prior* to the time of entering such disclaimer, although the invasion related to a part of the invention not disclaimed.

(*k*) The patentee, and the assignee of *part* of his interest, may and should join as plaintiffs for an infringement; Weller and others *v.* Baker, 2 Wills. 423; 2 Saund. 115, 116 a.

(*l*) See *supra*, note (*i*).

(*m*) Omit the part between the brackets if there be no disclaimer. The specification was set out to explain the disclaimer.

whereas" [*&c.*]; and the plaintiff further saith, that there was and still is annexed to the said instrument in writing, or specification, a certain drawing with certain figures and letters marked thereon, as in the said instrument in writing, or specification mentioned]; and the plaintiff further saith, that afterwards, and before the committing by the defendant of the several grievances hereinafter mentioned, to wit, on [*&c.*] by a certain indenture then made between the said S. P. of the one part, and the plaintiff of the other part, (which said indenture, sealed with the seal of the said S. P. the plaintiff now brings here into Court, the date whereof is the day and year last aforesaid) the said S. P. for the considerations therein mentioned, did grant, bargain, sell, assign, transfer, and set over unto the plaintiff, his executors, administrators and assigns the said letters patent, and all benefit and advantage to be derived from the said letters patent, and all the right, title and interest, both at law and in equity, of the said S. P. of, in and to the same, to have and to hold the same unto the plaintiff, his executors, administrators and assigns thenceforth, for and during all the residue and remainder then to come and unexpired of the said term of fourteen years, by the said letters patent granted as his absolute estate and effects, as by the said indenture fully appears, whereby the plaintiff then became and was and thence hitherto hath been entitled to the privileges, benefits and advantages, of the said letters patent; and the plaintiff further saith, that after the making of the said indenture, and after the passing of a certain act of parliament passed in the sixth year of the reign of his late Majesty King William the Fourth, intituled "An Act to amend the law touching Letters Patent for Inventions," and before the commencement of this suit, to wit, on [*&c.*] he, the plaintiff, pursuant to the said statute, and by and with the leave of ——, Knt., then being his said late Majesty's solicitor-general, first had and obtained for that purpose, and duly certified by his, the said ——, fiat and signature in that behalf, entered with the clerk of the patents of England, a certain disclaimer and memorandum of alteration in writing, of part of the said specification, the same not being such disclaimer or alteration as extended the exclusive right granted by the said letters patent, by which disclaimer and memorandum of alteration, the same being under the hand and seal of the said plaintiff he did disclaim as follows:—"I, the said S. P., do hereby declare, that" [*&c.*], which said disclaimer and memorandum of alteration were afterwards, to wit, on [*&c.*] filed by the said clerk of the patents, and †duly inrolled with the said specification pursuant to the statute in that case made and provided, as by the record of the said specification and disclaimer and memorandum of alteration remaining of record in the said High Court of Chancery fully appears; and the plaintiff further saith, that the said S. P. from the time of granting the said letters patent until the making of the said indenture, made and exercised and vended the said invention, and that he, the plaintiff, hath always since the making of the said indenture

as aforesaid, by himself, his deputies, servants and agents in that behalf, made, used, exercised and vended the aforesaid invention, to wit, the said improvements in —— which he was so entitled to make, use, exercise and vend as aforesaid; yet the defendant, well knowing the several premises, but contriving and wrongfully and injuriously intending to injure the plaintiff and to deprive him of the profits, benefits and advantages which he might and otherwise would have derived and acquired from the making, using, exercising and vending of the said invention, after the making of the said letters patent and of the said indenture, and after the said disclaimer and memorandum of alteration were so entered, filed and inrolled as aforesaid, (*n*) and within the said term of fourteen years in the said letters patent mentioned, to wit, on [*&c. a day soon after the disclaimer*] and on divers other days and times between that day and the commencement of this suit, and within that part of the united kingdom of Great Britain called England, and in Wales and the town of Berwick-upon-Tweed, wrongfully, unlawfully and unjustly, without the leave or license and against the will of the plaintiff, *made and sold (o) divers, to wit*, 100 —— *in imitation of the said invention*, to the benefit, use, and enjoyment whereof the plaintiff was and is so entitled as aforesaid, and otherwise than in relation to the said part of the said invention so disclaimed as aforesaid, (*p*) in breach of the said letters patent and of the privileges to which the plaintiff was and is entitled as aforesaid. *Second Breach:*—And the plaintiff further saith, that the defendant, well knowing the several premises, but further contriving and intending as aforesaid, after the making of the said letters patent, and within the said term of fourteen years therein mentioned, and after the making of the said indenture, and after the said disclaimer and memorandum of alteration were so entered, filed and inrolled as aforesaid, to wit, on the said —— day of —— A. D. —— and on divers other days and times between that day and the commencement of this suit in England aforesaid, wrongfully and unjustly, without the leave or license and against the will of the plaintiff, * did *use and put in practice* the said invention, to the benefit, use and enjoyment whereof, the plaintiff was and is entitled as aforesaid, and otherwise than in relation to the said part of the said invention †so disclaimed as aforesaid, in breach of the said letters patent, and of the privileges to which the plaintiff was and is so entitled as aforesaid. *Third Breach:*—And the plaintiff further saith, that the defendant, well knowing [*&c. proceed as in second breach stating* " did *imitate the said invention*," *&c.* instead of the words in italics.] *Fourth Breach:*—And the plaintiff further saith, that the defendant, well knowing [*&c. proceed as in second*

(*n*) See Perry *v.* Skinner, cited *ante*, 584, n. (*i*).

(*o*) A count for "*exposing to sale*" was held bad on general demurrer; see Minter *v.* Williams, 4 Ad. & E. 251; 5 N. & M. 647; 1 H. & W. 585, S. C. See breaches assigned, Cornish *v.* Keane, 3 Bing. N. C. 570; 2 Chit. Pl. 5th ed. 761 a, 6th ed. 537.

(*p*) See Perry *v.* Skinner, *ante*, 584, n. (*i*).

*breach to the asterisk] did imitate in part and make a certain addition to the said invention*, to the benefit, use and enjoyment whereof the plaintiff was and is entitled as aforesaid, otherwise than in relation to the said part of the said invention so disclaimed as aforesaid, *whereby to pretend himself the defendant the inventor or devisor thereof*, and did then and there *put in practice* the said imitation in part with such additions as aforesaid, otherwise than in relation to the said part of the said invention so disclaimed as aforesaid, in breach of the said letters patent, and of the privileges to which the plaintiff was and is entitled as aforesaid. *Fifth Breach:*—And the plaintiff further saith, that the defendant, well knowing [*&c. proceed as in second breach to the asterisk*] *did counterfeit the said invention, and did use and practice* the same otherwise than in relation to the said part of the said invention so disclaimed, in breach of the said letters patent, and of the privileges to which the plaintiff was and is entitled as aforesaid; by means of the committing of which said several grievances by the defendant as aforesaid, the plaintiff has been and is greatly injured, and has lost and been deprived of divers great gains and profits, which he might and otherwise would have derived from the said invention and letters patent, and in respect whereof he was and is entitled to such privileges as aforesaid, and was and is otherwise damnified; To the damage, &c.

## PEWS.

[See Forms of declarations in case for disturbing plaintiffs in the enjoyment of Pews in churches, 2 Chit. Pl. 5th ed. 817; 6th ed. 582; Mainwaring *v.* Giles, 5 B. & Ald. 556; Lousley *v.* Hayward, 1 Y. & J. 583. Case for pulling down part of a pew; Harris *v.* Drewe, 2 B. & Ad. 164; Jones *v.* Ellis, 2 Y. & J. 265.]

## POUND BREACH AND RESCUE.

[See Forms in case for pound-breach and rescue on distresses, &c., 2 Chit. Pl. 5th ed. 732 to 735, 6th ed. 513 to 516. By 5 & 6 Will. 4, c. 59, s. 5, persons may enter Pounds to feed cattle impounded therein.]

## †PRESCRIPTIVE RIGHTS.

[See "Ancient Lights," "Common of Pasture," "Ways," "Watercourses;" and the Prescription Act, 2 & 3 Will. 4, c. 71; and as to the

decisions, &c. thereon, see the above titles, and *post*, "Trespass,"—Pleas: "Common," "Ways."

## RECTOR.

[See "Tithes," "Waste."]

[Declaration against the Executor, &c. of a deceased Rector at the suit of the successor for dilapidations: 2 Chit. Pl. 5th ed. 786, 6th ed. 555; Bird *v.* Relph, 2 Ad. & E. 773; 4 N. & M. 879; 2 Williams' Ex. 1068; 2 Stark. Ev. 2d ed. 711.]

## RESCUE.

[See "Pound Breach."]

## REVERSION. (*q*)

[Case by a Landlord for waste, &c. to the demised premises, during

(*q*) A landlord, or person having the immediate reversionary interest in premises, may maintain an action on the case against a party who commits an injury to the premises of so *permanent a nature* that the reversionary estate is prejudiced, and shall in such action recover a compensation for the injury to his reversion; and the wrong-doer is also liable to the tenant to the extent of the damage he sustains in reference to his possessory right and limited interest. A reversioner may sue for an injury to the land, &c., arising from an obstruction by a building to ancient lights or privileged windows belonging to the estate; Jesser *v.* Gifford, 4 Bur. 2141, where the earlier authorities are collected; or from the stopping up a right of way attached to the premises; see 8 Went. 550; 2 Chit. Pl. 5th ed. 777, note (*a*); 6th ed. 547, note (*a*); 1 Saund. 322 b, note; or the substantial obstruction, &c. of a watercourse running thereto; Wright *v.* Williams, 1 M. & W. 77; 1 Tyr. & G. 375, S. C.; Greenslade *v.* Halliday, 6 Bing. 379. And in an action against a tenant for opening a door in a wall, to the prejudice of the plaintiff's reversion, although actual damage to the *house* was disproved, the Court held that the jury ought to have been directed to inquire whether the *reversionary interest* had or had not been injured, which might have been the case by destroying evidence of title, &c., although the *house* was not injured; Young *v.* Spencer, 10 B. & C. 145; 5 M. & R. 47, S. C. A reversioner may sue for a nuisance affecting his reversionary interest, although no other present injury accrue and the nuisance be such that it is capable of removal before the reversioner comes into possession; Shadwell *v.* Hutchinson, Mo. & M. 350; 4 C. & P. 333, S. C. He may sue a stranger inflicting the injury, though the tenant concurred in committing it and be also liable; Egremont *v.* Pulman, M. & M. 404. As to proof of the tenancy laid in the declaration, see *ante*, 542, note (*b*). The tenant is a competent witness for the reversioner; Doddington *v.* Hudson, 1 Bing. 257. The declaration must allege the act to have been done to the damage of the plaintiff's reversion, or must state an injury of such a permanent nature as to be necessarily injurious to his reversion, otherwise the judgment will be arrested after verdict. Therefore where the plaintiff

the term, to the injury of the reversion; see "Landlord and Tenant," *ante*, 541, Form 1, and see Forms there referred to.]

### 1. *By Landlord for injury to his Reversion by erecting a raised Footpath, Posts, &c. through Fields occupied by Plaintiff's Tenants, in order to exercise a pretended Public Right of Way.*(r)

For that whereas before and at the times of the committing of the grievances by the defendant hereinafter mentioned, divers, to wit, twenty closes, with the appurtenants, situate in the county aforesaid, were respectively in the possession and occupation of certain persons, to wit,—— and —— respectively as tenants thereof respectively to the plaintiff, the reversion of and in the same closes or pieces of land respectively then still belonging to the plaintiff; Yet the defendant well knowing the premises, but contriving and wrongfully and unjustly intending to injure and prejudice and aggrieve the plaintiff in his reversionary estate and interest of and in the said closes with the appurtenants respectively, whilst the said closes were held by the said respective tenants thereof, and whilst the plaintiff was so interested therein as aforesaid, to wit, on [*&c.*], and on divers other days and times between that day and the commencement of this suit, wrongfully and unjustly, without the leave or license and against the will of the plaintiff, cut, dug, and made divers, to wit, 100 holes, 100 pits, 100 trenches in the said closes or parcels of land, and subverted and injured the earth and soil thereof, and put, placed, built, and erected divers, to wit, 200 posts, 200 rails, and 200 pales in and upon the said closes, and there wrongfully and injuriously kept and continued the same from thence until the commencement of this suit, and also then and there wrongfully and injuriously made and caused and procured to be made a certain raised footway, and a certain raised road, and

declared as reversioner of a yard and part of a wall occupied by his tenant, and that defendant wrongfully placed bricks, &c. on the said part of the wall, and raised its height, and placed timber thereon overhanging the yard, whereby plaintiff lost the use of the wall, and rain, &c. flowed into the yard and the wall and yard were injured, to plaintiff's damage, &c., without stating that the reversion was injured, the Court arrested the judgment; Jackson *v.* Pesked, 1 M. & Sel. 234. And in Baxter *v.* Taylor, 1 N. & M. 13; 4 B. & Ad. 72, it was decided that a reversioner cannot maintain an action against a stranger for merely entering upon the tenant's land, though the entry be made in the exercise of an alleged right of way, such act not being necessarily injurious to the reversion and no permanent injury to the land being shown; see Form 2, *supra*, 589. In Hare *v.* Horton, 5 B. & Ad. 715, the declaration stated that a foundery, messuages, and cranes, boilers, and other machinery, &c. which were described, were in the possession of the plaintiff's tenant, the reversion belonging to plaintiff; and that the defendant, contriving to injure plaintiff in his reversionary interest, broke and entered the foundery, machinery, &c. and messuages with the appurtenants, cranes, &c. tore up, broke down, and prostrated the same, seized, carried away, and converted the machinery, &c. and the cranes, &c. affixed to plaintiff's reversionary interest, and scattered and spread the same with rubbish, greatly injuring the said reversionary estate. Plea, not guilty. At the trial it appeared that the plaintiff had no right to the fixtures; held, nevertheless, that enough appeared on this declaration to support a verdict for the plaintiff for unnecessary damage done in removing the fixtures of which proof had been given.

(r) This form was used in a case in which the plaintiff had a verdict; see in general *supra*, 588, note (q).

a certain other road in and upon, and through and over the said respective closes, and there wrongfully and injuriously †kept and continued the same from thence until the commencement of this suit, for the purpose and in order that such raised footway, raised road, and other road so made in, upon, through, and over the said respective closes might be used by the public as a public or common footway, and under a false and unfounded claim, color, and pretence that there was a right of way, to wit, a public or common footway through, over, and along the said respective closes in, by, and along such raised footway, raised road, and other road so made by the defendant; and by reason of the premises the means of communication and access from some of the said closes to the residue thereof, and the means of cultivating the said several closes, were and are greatly impeded and obstructed, and the said closes or pieces of land were and are greatly encumbered, and divers parts of the same were and are separated from the residue of the same, and the same closes by reason of the premises became and were and are deteriorated in value, and injured and rendered less productive than the same otherwise might and would have been; by means of which several premises the plaintiff hath been and is greatly injured, prejudiced and aggrieved in his reversionary estate and interest of and in the said closes with the appurtenants respectively, so in the possession of his said respective tenants.

## 2. *By the Reversionary Owner of Goods against a Stranger for injuring the same, &c.* (*s*)

For that whereas the plaintiff, before and at the time of the committing of the grievance hereinafter mentioned, was the owner and proprietor of certain goods and chattels, to wit, [*describe them as in trover*], of great value, to wit, of the value of £——, which had been and were let to hire, (*t*) to wit, for a time then unexpired to one E. F. who then had the use and possession thereof, under such letting to hire, the reversionary property, estate, and interest in the said goods and chattels then belonging to the plaintiff; Yet the defendant well knowing the premises, but wrongfully intending to injure the plaintiff in his said reversionary

(*s*) See Form, 2 Chit. Pl. 5th ed. 767, 6th ed. 538; Jenkins *v.* Cooke, 1 Ad. & E. 372; Hare *v.* Horton, cited *ante*, 589, note (*q*). It is a rule that in order to maintain trespass, trover, detinue, or replevin for an injury to, or conversion or detention of goods, the plaintiff must have had at the time the cause of action accrued, the actual possession of, or the right to the immediate possession of the goods If he be the general owner, but has only a title or interest *in reversion*, and the *possessory right* is vested in another person by virtue of a letting to hire, &c., a special action on the case in the above form for an injury to the reversion must be brought; see Goulon *v.* Harper, 7 T. R. 9; Paine *v.* Sheriff of Middlesex, R. & M. 99; 1 Chit. Pl. 6th ed 152. After the death of a tenant for life of plate, the remainderman may maintain trover against a party to whom the tenant for life had pawned it without notice of the limited right of the pawner; Hoare *v.* Parker, 2 T. R. 376. Trover by a landlord for trees cut down during a lease, &c.; 1 Saund. 322, note 5; 1 Chit. Pl. 6th ed. 63.

(*t*) If it were merely a gratuitous loan the owner might sue in trover; 1 Chit. Pl. 6th ed. 152.

property, estate and interest, whilst the plaintiff was such owner and proprietor of the said goods and †chattels, and the same were in the possession of the said E. F. as aforesaid, to wit, on [*&c.*], wrongfully and injuriously broke to pieces, damaged, and spoiled, ["and destroyed," *if the fact be so,*] the said goods and chattels, [*or* "seised and took the said goods and chattels from and out of the possession of the said E. F., and absolutely sold the same and converted and disposed thereof to his the defendant's own use,"(*u*)] whereby the plaintiff was and is greatly injured and aggrieved in his reversionary property, estate and interest of and in the said goods and chattels. [*Add a count in trover if there be any doubt whether plaintiff was not at the time the absolute owner and entitled to the possession.*

## RIOT.

See "Hundred."

## SEDUCTION.

See "Master and Servant."

## SERVANTS.

See "Agents," "Carriages," "Master and Servant," "Ships."

## SHERIFFS. (*x*)

### 1. *For falsely returning Nulla Bona to a Fieri Facias.* (*y*)

*Commencement as ante*, 1; *venue transitory.*] For that whereas the plaintiff, †[*&c. state the judgment, &c. to the end of the reference to the*

(*u*) Where the goods have not been *injured*, but defendant has converted them to his own use by a sale, &c. to another, &c., this allegation would seem to be proper; and see the form Jenkins *v.* Cooke, 1 Ad. & E. 372. It may be doubtful whether a mere sale which is tortious and void against the general owner, is an injury to the reversioner enabling him to sue during the existence of the special interest of the hirer, &c.; see Owen *v.* Leigh, 3 B. & Al. 471, 473; 2 Ch. Pl. 5 ed. 767, n., 6 ed. 538, note (*f*); 1 M. & W. 685, 688.

(*x*) See in general as to the liability of sheriffs, Bac. Ab. "Sheriff," "Escape;"

*record, as ante*, 431.] And thereupon the plaintiff, for the obtaining satisfaction of the said money so recovered, the same being unsatisfied, afterwards, to wit, on [*&c.*] sued and prosecuted out of the said court, [*if the action be in a different court, say*, "wherein the said judgment was so recovered,"] a certain writ of our said lady the queen, called a fieri facias, directed to the sheriff of ——, whereby our lady the queen commanded the said sheriff that of the goods and chattels of the said E. F. in his the said sheriff's bailiwick, he should cause to be levied the damages, [*or if in debt*, "debt and damages,"] aforesaid, and that he should have that money before our said lady the queen forthwith, [*or* "on ——," *as in the writ*,] to render the said —— for his damages [*or if in debt* "debt and damages"] aforesaid; and that the said sheriff should have there then that writ, which said writ afterwards, and before the delivery thereof to the said sheriff, to wit, on [*&c.*] aforesaid, was duly indorsed with a direction for the said sheriff to levy [£——, besides sheriff's poundage, officer's fees, and all other incidental expenses, (*z*)] and being so indorsed was then delivered to the defendant, who then and from thence until, and at, and after the time of making the return to the said writ hereinafter mentioned, was sheriff of the said county of ——, to be executed in due form of law.* By virtue of which said writ, the defendant, being such sheriff, afterwards, and whilst the said writ was in force, to wit, on the day and year last aforesaid, and within his bailiwick, as such sheriff, seized and took in execution divers goods and chattels of the said E. F., of great value, to wit, of the value of the moneys so indorsed on the said writ, and directed to be levied as aforesaid, and then *levied the same thereout*; (*a*) Yet the defendant, being such sheriff, disregarding his duty as such sheriff, and wrongfully intending to injure the plaintiff in this behalf, had not the said moneys so levied as aforesaid or any part thereof in the said [last mentioned] Court, according to the exigency of the said writ, as the defendant could and might and ought to have done before

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Watson Office of Sheriff; Tidd's Pr. Ind. "Sheriff;" Chit. Arch. Ind. "Sheriff;" Harr. Ind. tit. "Sheriff;" Rosc. Ev. Ind. "Sheriff," 4 ed. 612; 2 Stark. Ev. 2d ed. 736; *post*, Pleas, "Sheriff." Actions for breach of duty of the office of sheriff must in general be brought against the high-sheriff, though the under-sheriff, or bailiff, be in fact the wrong doer or defaulter; Cameron *v.* Reynolds, Cowp. 403; 1 Chit. Pl. 6th ed. 82, 85. The sheriff is liable for the act of his officer acting under color of his warrant; *Anon.* Lofft, 81; Jones *v.* Parchard, 2 Esp. R. 507. He was held liable for an *arrest* by his officer under color of a *fieri facias;* Smart *v.* Hutton, 2 N. & M. 426. It has also been considered that he is responsible on an engagement made by an acknowledged town agent employed by the under-sheriff in the country; Thomas *v.* Pearse, 5 Price, 578; see Gibbons *v.* Sheriff of Essex, 2 Camp. 189.

But the sheriff is not liable for the act of his officer not within the scope, or having the color of the authority and power delegated to the latter, and not afterwards sanctioned or recognized by the sheriff; 1 Chit. Pl. 6th ed. 82; Underhill *v.* Wilson, 6 Bing. 697; 4 M. & P. 568; Crowder *v.* Long, 8 B. & C. 598. Form of action, &c. 1 Chit. Pl. Ind. "Sheriff." Evidence to establish the connexion between the sheriff and his bailiff, and to affect the former with the acts of the latter; Rosc. Ev. 4th ed. 613; 2 Stark. Ev. 2d ed. 738.

(*y*) 2 Chit. Pl. 5th ed. 748; 6th ed. 523 to 526; Stubbs *v.* Lainson, 1 M. & W. 728.

(*z*) Copy indorsement.

(*a*) Plea traversing the seizing and levying; Stubbs *v.* Lainson, 1 M. & W. 728. If it cannot be proved add the next form as a second count.

the commencement of this suit, but therein wholly failed and made default, nor hath the defendant paid such moneys, or any part thereof, to the plaintiff, and the defendant afterwards and before the commencement of this suit, to wit, on [*&c.*] wrongfully, falsely and deceitfully returned to the said [last mentioned] Court, upon the said writ, that the said E. F. had not any goods or chattels in his bailiwick †whereof he could cause to be levied the damages, [*or if in debt*, "debt and damages,"] aforesaid, or any part thereof, (*b*) as by the said writ and the return thereof remaining of record in the said [last mentioned] court appears, whereby the plaintiff hath been and is greatly injured and deprived of the means of obtaining the said moneys so indorsed on the said writ, and directed to be levied as aforesaid, and which are still wholly unpaid as aforesaid, and is likely to lose the same; To the plaintiff's damage of £——, and therefore he brings his suit, &c.

### 2. *For not Levying when there was an opportunity, and falsely returning Nulla Bona.*(*c*)

*Proceed as in the last form to the asterisk.*] And although there was then and afterwards, and whilst the said writ was in force, and before the commencement of this suit, divers goods and chattels of the said E. F. within the bailiwick of the defendant as such sheriff, and the defendant as such sheriff could and might and ought to have levied the moneys so indorsed on the said writ, and directed to be levied, and a reasonable time for so doing elapsed before the commencement of this suit, whereof the defendant being such sheriff during all the time aforesaid had notice; Yet the defendant, being such sheriff, disregarding the duty of his office, and wrongfully intending to injure the plaintiff in this behalf, did not nor would at any time during the last-mentioned time levy the money last aforesaid, or any part thereof, but wrongfully neglected and refused so to do, and therein failed and made default; and during all the last-mentioned time wrongfully neglected the execution of the said writ; and the defendant afterwards and before [*&c.* " wrongfully, falsely," *&c. proceed as in* Form 1, *supra*, 592, *stating false return, &c.*

### 3. *Various Forms in Actions against Sheriffs for neglect of Duty.*

[Forms of declaration against sheriff for *Escapes* on mesne and final process, and not taking when there was an opportunity, and for false returns; see *ante*, 526, tit. Escapes.

For not assigning a bail-bond; 2 Chit. Pl. 5 ed. 755; 6 ed. 530.

For an excessive levy and not selling for the best price upon a fieri facias; Phillips *v.* Bacon, 9 East, 298.

(*b*) Copy return in the past tense.

(*c*) 2 Chit. Pl. 5 ed. 750; 6 ed. 525.

For not selling goods within a reasonable time after seizure under a fieri facias; Jacobs *v.* Humphreys, 2 C. & M. 413; Aireton *v.* Davis, 9 Bing. 740; 3 M. & Sc. 138, S. C.; Carlile *v.* Parkins, 3 Stark. R. 163.

By a landlord against a sheriff on 8 Ann. c. 14, for removing goods †taken in execution without satisfying a year's rent due; 2 Chit. Pl. 5 ed. 818; 6 ed. 586; Thurgood *v.* Richardson, 7 Bing. 428; 5 M. & P. 266, S. C.; Andrews *v.* Dixon, 3 B. & Al. 645.

For refusing to take bail; 2 Chit. Pl. 5 ed. 821; 6 ed. 587; Millar *v.* Sir M. Wood. 5 C. & P. 587.

By a landlord against a sheriff for not taking a replevin bond; 2 Chit. Pl. 5 ed. 740; 6 ed. 526.

For taking insufficient pledges in Replevin; 2 Chit. Pl. 5 ed. 754; 6 ed. 529.

Against a sheriff for refusing to replevy on a distress for a poor-rate; Sabourin *v.* Marshall, 3 B. & Ad. 440.

For extortion; 2 Chit. Pl. 5 ed. 827; 6 ed. 591.]

## SHIPS. (*d*)

### 1. *Against the Owner or Captain of a Ship, for running foul of Plaintiff's Vessel.* (*e*)

For that whereas the plaintiff, before and at the time of the committing of the grievance by the defendant hereinafter mentioned, was law-

(*d*) For negligence or unskilfulness in navigating a ship, whereby another vessel is injured, either *Case* or *Trespass* may be supported—with this difference, that the former is necessarily the remedy where the action is against the owner, for the carelessness of the crew. Where the action is against a party who *wilfully* caused the collision, the proper remedy is *Trespass;* Huggett *v.* Montgomery, 2 N. R. 446; Ogle *v.* Barnes, 8 T. R. 188; Bowcher *v.* Noidstrom, 1 Taunt. 568; Williams *v.* Holland, 10 Bing. 112; 3 M. & Sc. 540; 6 C. & P. 23, S. C. The action is not maintainable unless the injury arose entirely from the fault of the defendant; if both were in the wrong, and the plaintiff's carelessness or unskilfulness partly led to the collision, no action lies; see Vennall *v.* Garner, 1 C. & M. 21; Vanderplank *v.* Miller, M. & Mal. 169; Collinson *v.* Larkins, 3 Taunt. 1; Luck *v.* Seward, 4 C. & P. 106; Luxford *v.* Large, 5 C. & P. 421; *ante*, 505, n. (*i*); *post*, *Pleas* "Ships." The defendant is not liable if he acted with reasonable prudence, care and skill; see Luck *v.* Seward. It seems that there is a rule for ships at sea, viz. that if a vessel is going close-hauled to the wind, and another meeting her is going free, the latter vessel should go to leeward; and although such vessel may either go to windward or leeward as she best can, yet she ought as a general rule to suppose that the vessel going to windward will keep her position; Handayside *v.* Wilson, 3 C. & P. 528; Jameson *v.* Dunkald, 12 Moor, 148. A departure from the general rule or understanding would not however be *conclusive* evidence of neglect, &c. see *ante*, 505, n. (*i*). In general the action may be against the owner or captain of the ship inflicting the injury; but neither is liable where the *proper pilot* is on board under the compulsory provisions of the statute 6 Geo. 4, c. 125, see sections 55, &c.; it must however appear not only that a pilot was on board, but also that at the time of the accident he had the direction of the defendant's vessel; Catts *v.* Herbert, 3 Stark. R. 12. In M'Intosh *v.* Slade, 6 B. & C. 657; 9 D. & R. 738; it appeared that a vessel had to deliver part of her cargo at the London Docks, and

fully possessed †of a certain ship or vessel [*or* "barge," *as the case may be*,] of great value, to wit, of the value of £——, then lawfully being in the river ——, and the defendant was also then possessed of a certain other ship or vessel [*or* "barge," *as the case may be*,] in the river aforesaid, and then had the care, direction and management of the same; Yet the defendant, not regarding his duty in that behalf, whilst the said ships or vessels respectively so were in the said river, to wit, on [*&c.*] took so little and such bad care of his said ship or vessel and governed and navigated the same in so unskilful and improper a manner, * that the same, by and through the carelessness, unskilfulness, misdirection, mismanagement and improper conduct of the defendant in that behalf, *(f)* then with great force and violence ran foul of and struck against the said ship or vessel of the plaintiff, and thereby then greatly broke, damaged and injured the same, and thereby divers goods and chattels, to wit, [*&c. describing them as in trover*,] of the plaintiff, of great value, to wit, of the value of £——, then being in his said ship or vessel, then became and were greatly damaged, wetted and spoiled; and also by reason of the premises, the plaintiff then necessarily incurred divers expenses, to wit, to the amount of £——, in and about the surveying and repairing the said damage so done to his said ship or vessel as aforesaid; and also by means of the premises, the plaintiff lost and was deprived of the use of his said ship or vessel for a long space of time, to wit, for the space of ——, and thereby lost and was deprived of all the profits and advantages which during that time he might, and also otherwise might and would have derived and acquired from the use of his said ship or vessel.

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part at a wharf higher up the river. She went to the docks under the charge of a pilot, who left her there, where she remained some time without discharging any of her cargo, as the part to be left at the wharf was uppermost. She then went under the charge of another pilot up the river to the wharf, and by the neglect of the pilot ran down a barge:—Held, that under 6 Geo. 4, the pilot, and not the owner, was liable, as the latter was bound to have a pilot on board and that it was not a mere change of mooring; see further Abb. Ship. 5 ed. 159. The pilot is liable to an action at the suit of the owner of the injured vessel, if guilty of neglect in steering, although a superior officer were on board; Stort *v.* Clement, Peak. R. 107; see sect. 55 of 6 Geo. 4, c. 125. By the 53 Geo. 3, c. 159, the responsibility of ship-owners for damage done by their ships to other vessels is limited to the value of the ship doing the damage:—Held, that such value must be ascertained as at the time of the accident; Dobree *v.* Schroder, 6 Simon, 291. As to ownership and evidence thereof, see the Ship Register Act, 3 & 4 Will. 4, c. 55, and see 5 & 6 Will. 4, c. 19, Chit. & Hulme Col. Stat. tit. "Ships," "Seamen." It was held before the late statute for the amendment of the law, that the captain and crew might be rendered competent witnesses for the defendant the owner without a release; Perry *v.* Bouchier, 4 Camp. 80. It seems that by virtue of that act a release is unnecessary; see Yeomans *v.* Legh, 2 M. & W. 419.

(*e*) See Forms, Leame *v.* Bray, 3 East, 599; 2 Chit. Pl. 5th ed. 713, 6th ed. 495.

*(f)* The allegation was negligence, &c. in steering and directing, the evidence was unskilful stowage of an achor, which thereby caught hold of the plaintiff's vessel's side; held a variance; Hulman *v.* Bennett, 5 Esp. R. 226.

2. *Against the Proprietors of a Steam Vessel for causing a dangerous Swell in the River Thames, whereby Plaintiff's Vessel was swamped.*(*g*)

For that whereas, [*proceed as in* Form 1, *supra, to the asterisk, describing defendant's vessel as a* "steam vessel,"] and then wrongfully and improperly †navigated and propelled the said vessel, and caused and suffered the same to be navigated and propelled in the said river near to the said ship or vessel of the plaintiff, in so immoderate, rapid, careless and improper a manner, that by reason and means thereof there then were a great, excessive, undue, immoderate and dangerous swell and disturbance of the water of the said river near to and about the plaintiff's said ship or vessel [*or* "barge"]; and by reason of the premises, divers large quantities of the water of the said river then rushed, flowed, and came into and upon the said ship or vessel of the plaintiff, and the same was thereby overwhelmed and then sunk in the said river, and by reason thereof ["the plaintiff, who then was in his said ship or vessel, was then in great danger of being drowned, and was greatly hurt, bruised and wounded, and became and was sick, ill and disordered, and so hath remained thence hitherto, and thereby also"] the said ship or vessel of the plaintiff, with its appurtenances, was then greatly broken, strained, damaged and injured, and divers goods of the plaintiff therein being, to wit, —— of great value, to wit, £——, were destroyed and wholly lost to the plaintiff; and thereby also the plaintiff incurred and was subjected to divers expenses, to wit, to the amount of £——, in weighing and raising his said ship or vessel from and out of the said river, and clearing the same from water, and having the same removed and surveyed and the damage done thereto estimated, and the plaintiff then incurred other expenses, to wit, £——, in and about the preserving and picking up divers materials and things belonging to and being in the said ship or vessel of the plaintiff; and also by reason of the premises, the plaintiff lost and was deprived of the use of his said ship or vessel, for a long time, to wit, from the time of committing the said grievances hitherto, and hath thereby been deprived of divers gains and profits which otherwise might and would have accrued to him from the use thereof; and thereby also the plaintiff lost the freight and reward, to wit, £——, which would otherwise have been payable to him for freight for conveying in his said ship or vessel divers goods, to wit, —— which were therein when she was so sunk as aforesaid, and was and is by reason of the premises otherwise injured.

(*g*) See a form, Luxford *v.* Large, 5 C. & P. 421. It was there held by Denman, C. J. that in such action the mischief must appear to have been occasioned by the swell alone, and that if the jury think that point doubtful, or think that the plaintiff contributed to the injury he sustained by his own improper conduct either in mismanaging or in overloading his vessel, they must find their verdict for the defendant.

## SLANDER.

See "Libels and Slander."

## †SURGEONS.

### *Against a Surgeon and Apothecary for Neglect, &c. in his treatment of the Plaintiff.* (*h*)

For that whereas before and at the time of the committing of the grievances by the defendant as hereinafter next mentioned, to wit, on [*&c.*] the plaintiff, at the request of the defendant had retained and employed the defendant as a surgeon and apothecary, he then carrying on the profession and business of a surgeon and apothecary, to attend him, the plaintiff, and to bestow the care, diligence, and attendance of him, the defendant, as such surgeon and apothecary, in and about the endeavoring to cure him, the plaintiff, of a certain malady and illness under which he, the plaintiff, then labored, for fees and reward to be therefore paid *by the plaintiff* (*i*) to the defendant in that behalf, and the defendant then accepted and entered upon such retainer and employment as such surgeon and apothecary as aforesaid; and thereupon it then became and was the duty of the defendant as such surgeon and apothecary to use due and proper care, skill, and diligence in and about the endeavoring to cure the plaintiff of the said malady and illness under which he, the plaintiff, then labored as aforesaid; Yet the defendant, not regarding his said duty but contriving and intending to injure the plaintiff in this respect, did not nor would use due and proper care, skill, or diligence in and about the endeavoring to cure the plaintiff of the said malady and illness, but on the contrary thereof the defendant then conducted himself in an ignorant, unskilful, negligent, and improper manner in that behalf, *in this, to wit*, (*k*) that the defendant did not bleed him the plaintiff at an early stage

(*h*) This form was used in a case in which the defendant had a verdict upon the merits. See *post*, *Pleas*, "Surgeon." Forms and law, Slater *v.* Baker, 2 Wils. 359; Seare *v.* Prentice, 8 East, 348; Pippin *v.* Sheppard, 11 Price, 400: Hancke *v.* Hooper, 7 C. & P. 81; see Chit. jun. Cont. 2d ed. 438. A medical man is liable for gross negligence or unskilfulness, though he act gratuitously, *id.*; and per Mr. Justice Heath in Shiell *v.* Blackburne, 1 H. Bla. 158. He must always use ordinary and reasonable care and skill.

(*i*) It is sufficient to aver that the defendant was a surgeon, "and was retained and employed as such," (without stating by whom,) "for reward to him to treat and cure the plaintiff, and that defendant entered upon the treatment," &c., without showing any undertaking by defendant, or averring in words that it was defendant's duty to act skilfully, &c.; Pippin *v.* Sheppard, 11 Price, 400.

(*k*) The declaration was in this form, but where there is any difficulty in detailing the nature of the neglect, &c. omit the particular statement introduced by the words "in this, to wit," &c.

of his, the plaintiff's, said sickness, to wit, on [*&c.*] aforesaid, when he, the defendant, if he had used due or proper care, diligence, or skill in that behalf, ought so to have bled him, the plaintiff. And the plaintiff also saith, that the defendant, further contriving and intending as aforesaid, further conducted himself in an ignorant, unskilful, negligent, and improper manner in and about his said retainer and employment, in this, to wit, that he, the defendant, at a subsequent †stage of the plaintiff's said illness, malady and sickness, and whilst he, the defendant, was so retained, to wit, on [*&c.*] bled the plaintiff in a profuse manner and to a great, immoderate, and unnecessary extent, and then and thereby took from the plaintiff a great quantity, to wit, —— ounces of blood, the same being an excessive and injurious quantity, and which the defendant, if he had used due and proper care, diligence and skill ought not to have taken from the plaintiff in that behalf. And the plaintiff also saith, that the defendant, further contriving and intending as aforesaid, further conducted himself in an ignorant, unskilful, negligent, and improper manner in and about his said retainer and employment, in this, to wit, that the defendant on [*&c.*], and on divers, to wit, the fourteen days then next following, and before the commencement of this suit, immoderately, unskilfully, and negligently administered to the plaintiff large, immoderate, and improper doses of medicine, that is to say, three grains of mercury every six hours during the time last aforesaid; the same being excessive and injurious doses, and which the defendant, if he had used due and proper care, diligence and skill, ought not to have administered to the plaintiff in that behalf; By reason of which said several premises the plaintiff became and was and still is greatly injured and prejudiced in his health and constitution, and thereby the plaintiff suffered and underwent great and unnecessary pain and anguish, and was and is much reduced and weakened in body; and the recovery of the plaintiff from the said malady and illness hath been and is thereby greatly retarded, delayed and impeded. And also by reason of the said negligent and ignorant conduct of the defendant in and about his said employment and retainer, the plaintiff was forced and obliged to and did necessarily pay, lay out, and expend a large sum of money, to wit, the sum of £——, in and about the obtaining proper medical advice and assistance, and in and about the endeavoring to be cured of the said sickness which had been so prolonged and increased by means of the said negligent, unskilful, and improper conduct of the defendant as aforesaid.

## TITHES.

[Form of declaration in case against a rector, at the suit of the occupier [†598]

of land, for not carrying away great tithes therefrom; 2 Chit. Pl. 5 ed. 782; 6 Ed. 551.

By a rector for obstructing his way to remove tithes; James *v.* Dods, 2 C. & M. 266; 4 Tyr. 101, S. C.; 2 Chit. Pl. 5 ed. 810 b; 6 ed. 578; see Tebbutt *v.* Selby, 1 N. & P. 710, cited *ante*, 526, tit. "Easements."]

## †TOLL.

See "Fairs," "Market."

[See Richardson *v.* Copes, 2 B. & C. 841; 2 Chit. Pl. 5 ed. 818 c; 6 ed. 585.]

## TROVER.

See that title *infra.*

## TURBARY.

[See tit. "Common," *ante*, 509; and see forms for disturbance of common of turbary, Greenhow *v.* Ilsley, Willes, 619; 8 Wentw. 513, 597; 2 Chit. Pl. 5 ed. 805; 6 ed. 573.]

## WAGGON, OR COACH, OR BOOKING-OFFICE KEEPER.

### *Declaration against, for not Forwarding and for losing Goods.* (*l*)

For that whereas before and at the time of the delivery of the goods and chattels to the defendant as hereinafter mentioned, the defendant kept a certain warehouse or waggon-office, to wit, —— in the city of London, for the receipt and booking of goods and chattels intended to be forwarded and sent from thence to divers places in this kingdom by waggons or other carriages, for the carriage and conveyance of goods and

(*l*) See a form of declaration in *assumpsit*, for not taking care of goods, and delivering them to a carrier to be forwarded, *ante*, 101. Form in *assumpsit*, Gilbart *v.* Dale, 1 N. & P. 22. Form in case for losing a passenger's luggage, Miles *v.* Cattle, 6 Bing. 744: 4 M. & P. 630. The contract of a booking-office-keeper is only to deliver safely to a carrier; and it is not sufficient evidence of negligence on the part of such office-keeper to show merely that the goods did not reach their destination; Gilbart *v.* Dale, 1 N. & P. 22.

chattels for hire to such places, and for the delivery thereof to the persons having the care of such waggons or carriages, for the purpose of the same being forwarded, sent, and carried by such waggons or carriages, and for the taking care thereof previous to and until the delivery of such goods and chattels to such persons as aforesaid, for the purpose aforesaid, for reward to the defendant in that behalf; and thereupon heretofore, to wit, on [*&c.*] the plaintiff caused to be delivered to the defendant at the said warehouse or waggon-office certain goods and chattels of the plaintiff, to wit, [*describe them as in trover,*] of great value, to wit, £——, to be by him, the defendant, booked and delivered to the person having the care of a certain waggon, called —— waggon, for the carriage and conveyance of goods and chattels for hire from the said warehouse or waggon-office to —— aforesaid for the purpose of the same being carried and conveyed by such waggon from London aforesaid to —— and there, to wit, at —— aforesaid delivered for the plaintiff, and in the mean time until the delivery thereof to such person so having the care of the said waggon, to be taken care of by the defendant at his said warehouse or waggon-office for reward to the defendant in that behalf; and the defendant then accepted and received the said goods and chattels for the purpose aforesaid, and thereupon it then became and was the duty of the defendant to deliver the said goods and chattels to the person having the care of the said last mentioned waggon for the purpose aforesaid, in a reasonable time then next following, and in the mean time and until such delivery to take care thereof at the said warehouse or waggon-office as aforesaid, and although a reasonable time for the delivery of the said goods and chattels to some person having the care of the said waggon for the purpose aforesaid hath long since elapsed, and the defendant could and might and ought to have delivered the said goods and chattels to the same person for the purpose aforesaid, within such reasonable time as aforesaid; Yet the defendant, not regarding his said duty but contriving to injure the plaintiff, did not nor would deliver or cause to be delivered the said goods and chattels to any person having the care of the said waggon for the purpose aforesaid within such reasonable time, or in the mean time, or until such delivery, take due and reasonable care thereof at the said warehouse or waggon-office, and the defendant, whilst he had the care and custody of the said goods and chattels for the purpose aforesaid, to wit, on [*&c.*] aforesaid, took so little and such bad care of the said goods and chattels, and behaved and conducted himself so carelessly and improperly in that behalf, that the said goods and chattels then became and were wholly lost to the plaintiff.

[†600]

## WARRANTIES.

See "Fraud," *ante*, 528 to 503.

## WASTE.

See "Landlord and Tenant," "Rector," "Reversion."

## †WATERCOURSES. (*m*)

1. ***Common Count for obstructing the Water of a Watercourse from flowing to Plaintiff's Mill, and causing it at other times to rush with unusual force against Plaintiff's Close, &c.***

For that whereas, before and at the times of the committing of the grievances by the defendant as hereinafter mentioned, the plaintiff was

(*m*) *Case* is the proper remedy for the obstruction of, or other unauthorized interference with a watercourse or stream, to the injury of the plaintiff, whether his interest and right to the use and enjoyment of the water be in possession or reversion; provided the cause of obstruction be not an erection made, or other act done, by the defendant entirely upon the *plaintiff's* land, in which instance the form of action should be *trespass;* see 1 Chit. Pl. 6th ed. 128, 140; see the distinction, *ante*, 496, note (*a*). "Suppose a person to be affected in the enjoyment of a watercourse by the erection of a weir, partly placed on his own land and partly on his neighbor's; that which was placed upon his own land would be the subject of an action of trespass. If the acts be both done at the same time and there be a common injury, it seems to me the plaintiff may bring either case or trespass, alleging the common damage," per Lord Abinger, C. B. and Parke, B. Wells *v.* Ody, 1 M. & W. 459, 462. The right to the enjoyment of a watercourse is an *easement* and not a profit *a prendre* in the soil of another. In Manning *v.* Wasdale, 1 N. & P. 172, it was held that the right of an occupier of an ancient messuage to water his cattle at a pond, and to take the water thereof for domestic purposes for the more convenient use of his messuage, is an *easement.*

The law respecting the right to water is clearly elucidated in the elaborate judgment of Lord Denman, C. J., in Mason *v.* Hill, 5 B. & Ad. 1; 3 *id.* 304; 2 N. & M. 747, S. C.; and see the cases collected in Harrison's Ind. tit. "Water;" 2 Stark. Ev. 2d ed. 909, 1151, tit. "Watercourse." Running water is originally *publici juris*, and an individual can in general only acquire an exclusive right to it, enabling him to sue for an obstruction or injurious interference with the stream to his prejudice, by *applying* so much of it as he requires for a beneficial purpose. Each owner of land on the banks of a river or stream has a right to the enjoyment of the water flowing in its natural course, and is entitled to use it for any purpose not inconsistent with similar enjoyment in the owners above and below. He cannot however acquire a right to throw the water back on the proprietor above, or to divert it from the proprietor below, without a grant from such proprietor, or an enjoyment uninterruptedly for *twenty* years; and the right of appropriation to particular purposes cannot be acquired as against the owners of lands on the banks of the stream, by an user for a less period; see Mason *v.* Hill; Williams *v.* Morland, 2 B. & C. 910; 4 D. & R. 583; Wright *v.* Howard, 1 Sim. & Stu. 190; 2 Stark. Ev. 910, and see the statute 2 & 3 W. 4: (see however *per* Alderson, J. in Frankum *v.* Falmouth, 6 C. & P. 529;

lawfully †possessed of a certain mill and manufactory, and certain closes and premises [*as the case may be*], with the appurtenances, in the county

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Canham *v.* Fisk, 2 Tyr. 155; 2 C. & J. 126.)

By the stat. 2 & 3 W. 4, c 71, s. 2, it is enacted, "that no claim which may be lawfully made at the common law, by custom, prescription, or grant, *to any way or other easement*, or to any *watercourse, or the use of any water*, to be enjoyed or derived *upon, over, or from any land or water* of our said lord the king, his heirs or successors, or being parcel of the Duchy of Lancaster or of the duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been *actually enjoyed* by any person *claiming right thereto without interruption for the full period of twenty years*, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of *twenty years*, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of *forty years*, the right thereto shall be deemed *absolute* and indefeasible, *unless* it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by *deed or writing*.

The 4th, 6th, and 7th sections of the act, which show how the prescribed periods are to be calculated; and point out *exceptions* in the case of persons under disability, as infancy, or enjoyment against tenants for life, &c.; have been already cited fully *ante*, 498, note (*b*). See further *post*, "Trespass," Pleas, "Watercourse," where the recent cases on this subject, viz. Bright *v.* Walker, 1 C. M. & R. 211; Beasley *v.* Clarke, 2 Bing. N. C. 705, &c., are fully cited. In Wright *v.* Williams, 1 Tyr. & G. 375; 1 M. & W. 77, it was held that a claim by the owner of a copper-mine to sink pits on his own land, to fill such pits with iron, and to cover the same with water pumped from the mine, for the purpose of precipitating the copper contained in such water, and afterwards to let off the water impregnated with metallic substances into a watercourse upon the land of another, is a claim to a "watercourse" within the 2 & 3 W. 4.

As to *licenses* to make drains, &c., see Hewlins *v.* Shippam, 7 D. & R. 783; 5 B. & C. 221; Fentiman *v.* Smith, 4 East, 107; Mason *v.* Hill, *supra*. The plaintiff's father by oral license permitted the defendant to lower the bank of a river, and make a weir above plaintiff's mill, whereby less water than before flowed to plaintiff's mill; held, that plaintiff could not sue defendant for continuing the weir; Liggins *v.* Inge, 7 Bing. 682; 5 M. & P. 712, S. C.

It is no defence to an action for obstructing a watercourse, in violation of a right acquired, that slight alterations have been made by the claimant in the mode of enjoying his privilege, &c.; see Saunders *v.* Newman, 1 B. & Ald. 258; Greenslade *v.* Halliday, 6 Bing. 379; 4 M. & P. 71. Nonuser for sixteen years; Bower *v.* Hill, 1 Bing. N. C. 549; 1 Scott, 526.

It is clearly sufficient to *declare generally* upon the plaintiff's possession and enjoyment of the use of the water as of right, as in the above form. This was sufficient before the 2 & 3 W. 4, c. 71, and the 5th section sanctions such mode of alleging the claim; see *ante*, 498, note (*b*). As to the form of claiming and justifying under a right of this kind in a *plea*, see *post*, "Trespass," Plea, "Watercourses," and the notes. It has been usual to charge in the declaration that the plaintiff was possessed of a mill or close, "*and by reason thereof*" of right ought to have enjoyed, &c. This allegation of right resulting from *possession*, is evidently inapplicable and incorrect, where the right arises from a *grant* or license or agreement; see Fentiman *v.* Smith, 4 East, 107; Hewlins *v.* Shippam, 5 B. & C. 221; 2 Stark. Ev. 2d ed. 911. And where the declaration charged that the plaintiff was possessed of a *mill*, "and by reason thereof" was entitled to a watercourse, but the proof was that the right existed only in respect of plaintiff's *land*, and could not have arisen from his possession of his mill, as it was built within twenty years, the judge at the trial would not permit an amendment; and although the jury found the plaintiff's right specially, and it was indorsed on the postea under 3 & 4 W. 4, c. 42, s. 24, yet the court above would not give judgment for the plaintiff on that finding; because if the declaration had been accurate the defendant might have pleaded differently; Frankum *v.* Earl of Falmouth, 6 C. & P. 529; 2 Ad. & E. 452; 4 N. & M. 330. It seems advisable in general to omit the words "by reason thereof," &c.

Care should be taken to describe the *cause* of the injury accurately in the declaration. A count for diverting water, is not supported by evidence of penning back and causing an overflow; Griffiths *v.* Marson, 6 Price, 1. A count for erecting a dam, and thereby diverting and preventing water from flowing in its usual course and supplying a mill, was held to be sustained

aforesaid, (*n*) and [by reason thereof (*o*)] the plaintiff, before and at the times of the committing such grievances, of right ought to have had and enjoyed, and still of right ought to have and enjoy the benefit and advantage of the water of a certain stream which had been used to run and flow, and during all that time of right ought to have run and flowed, and still of right ought to run and flow [in great plenty and in its usual and proper course, flow, and current] unto the said mill, manufactory, closes, and premises of the plaintiff, for supplying the same with water for working, using, and enjoying the said mill, [*&c.*] respectively, (*p*) and for other necessary, beneficial and useful purposes in that behalf; (*q*) Yet the defendant, contriving and intending to injure the plaintiff, heretofore, to wit, on [*&c.*] and on divers days and times afterwards and before the commencement of this suit, wrongfully and injuriously made and placed and erected (*r*) a certain dam and hatch, and certain pipes and other erections in and across part of the said stream above the plaintiff's said tenements, and in and upon the banks and sides of the said stream above the plaintiff's said tenements, and wrongfully and injuriously there kept and continued the said dam, hatch, pipes, and other erections so there made, placed, and erected for a long space of time, to wit, from thence until the commencement of this suit, *and thereby* (*s*) during all that time unlawfully and wrongfully penned back and stopped the water of the said stream, and diverted and turned divers large quantities of the water of the said stream, which ought to have flowed to the said tenements of the plaintiff respectively, away from the said tenements, and prevented the same from flowing to the said tenements; And the defendant, further contriving as aforesaid, on other days and times whilst the plaintiff was so possessed of his said tenements, to wit, on, [*&c.*] and other days and times afterwards and before the commencement of this suit, wrongfully and injuriously, by means of the said dam and obstructions and erections and otherwise, wrongfully caused divers other large quantities of the wa-

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by proof that the dam prevented the regular supply of water, but did not divert the stream, as the water returned to its regular course before it reached the mill and caused no waste; Shears *v.* Wood, 7 Moor, 345. And where the charge was the digging a sewer and diverting water from a pond, and the evidence was that the water was diverted by digging the sewer, but previously to making it, and that since the sewer was made the water could not rise to its former height; held not a fatal variance as regarded the continuance of the sewer; Dukes *v.* Gostling, 1 Bing. N. C. 589; 1 Sc. 570; 1 Hodg. 120, S. C.

(*n*) The venue is local, and the county should be here stated; but a local description is not necessary; Mersey Navigation *v.* Douglas, 2 East, 497. Variance in describing the situation of a weir; Gibson *v.* Wells, 1 New R. 290. But a mistake of this kind not misleading the defendant, &c. would probably be amended at the trial.

(*o*) *Supra*, note (*m*).

(*p*) The right to the water for a beneficial purpose must be shown; see Williams *v.* Morland, and other cases cited *supra*, 601, note (*m*). Allegation of claim to water for culinary and domestic purposes, for convenient use of house; Manning *v.* Wasdale, 1 N. & P. 172.

(*q*) Of course this statement will depend on the facts.

(*r*) See the forms referred to *post*.

(*s*) It seems that a declaration charging an obstruction, without showing how it was caused, would be bad on special demurrer for uncertainty; see *ante*, 511, note (*t*); *Anon.* Lord Ray. 452. See general count, Frankum *v.* Earl of Falmouth, *supra*, 601, note (*m*); 2 Chit. Pl. 5th ed. 790, 6th ed. 559.

ter of the said stream to run, rush, and flow against and unto and past the said closes of the plaintiff respectively, in a violent, undue, immoderate, rapid, and impetuous manner, and with much greater violence, rapidity, force, and impetuosity than the water of the said stream had been used and accustomed to run and flow, and otherwise might and would have run and flowed unto, against and past the said closes of the plaintiff, and thereby to wash away a great part of the banks and sides and other parts of the same closes, and greatly injure the same; by means of which said several premises the plaintiff was, for and during all the time aforesaid, hindered and prevented (*t*) from using his said mill, manufactory, closes and premises with the appurtenants in so ample, extensive, and beneficial a manner as he otherwise might and would have done, and the said several tenements of the plaintiff became and were and are much injured and deteriorated in value.

†2. *Against the Occupier of Land, in which there was the Flood Hatch of a Reservoir connected with a Stream, for keeping open the Hatch improperly, whereby Plaintiff's Corn Mill was not sufficiently supplied with water.* (*u*)

For that whereas the plaintiff, before and at the times of the committing of the grievances by the said defendant hereinafter mentioned, was and from thence hitherto hath been and still is lawfully possessed of a certain water corn mill, with the appurtenants, situate in the county aforesaid, and near to and upon a certain watercourse in the said county, and [by reason thereof (*v*)] the plaintiff before and at the times of the committing of the grievances hereinafter next mentioned of right ought to have had and enjoyed, and still of right ought to have and enjoy the benefit and advantage of the water of the said watercourse for the working of the said mill, and which water during all that time ought to have run and flowed, and still of right ought to run and flow through and *over the flood hatch of and belonging to a* (*x*) reservoir there along the said watercourse unto the said mill; and whereas also, the plaintiff, by reason of his possession of the said mill with the appurtenants, during all the time aforesaid, of right ought to have had and enjoyed, and still of right ought to have and enjoy the liberty and privilege of having the water flowing into

(*t*) *Quære*, whether a temporary and slight obstruction, occasioning no real or sensible damage, would be actionable; see Taylor *v.* Bennett, 7 C. & P. 329; *ante*, 498, note (*b*). *Semble* not, if the *right* were not put in litigation by the defendant; see 2 Stark. Ev. 2d ed. 911, note (*d*), 913, note (*y*). But in general the mere invasion of a right, which might become prejudicial, is actionable without proof of any specific injury; *id.*; 1 Saund. 346 b.

(*u*) This declaration was settled by eminent counsel shortly before the new rules on pleading; and there were several counts, including a count for not repairing the hatch.

(*v*) As to this allegation, see *ante*, 602, note (*m*).

(*x*) In other counts "through and out of a reservoir there along, &c."

the said reservoir from time to time pooled and penned back *therein by means of the said flood hatch* (*y*) for the supplying of the said mill with water sufficient for the working thereof; and whereas also the defendant before and at the times of the committing of the grievances by them hereinafter next mentioned was and still is possessed (*z*) of the said flood hatch of and belonging to the said reservoir, and by reason thereof from time to time during the time aforesaid of right ought to have pooled and penned back, and still of right ought from time to time to pool and pen back in the said reservoir, by means of the said flood hatch, the water flowing into the said reservoir, for the supplying of the said mill with water and sufficient for the working thereof *upon reasonable notice and request from the said plaintiff so to do* (*a*); And the said plaintiff saith, that heretofore and whilst he was so possessed of the said mill and entitled to have the water pooled and penned back in the said reservoir as aforesaid, and whilst the defendant was so possessed of the said flood hatch, and liable to pool and pen back the water in the said reservoir as aforesaid, to wit, on [&c.] and on divers other days and times between that day and the commencement of this suit, he, the plaintiff, gave notice to the defendant and requested him to pool and pen back the water in the said reservoir for the purpose of supplying the said mill of the plaintiff with water sufficient for the working thereof; and although the defendant might and ought so to have done at the several times aforesaid, the same being reasonable and proper times in that behalf, Yet the defendant, not regarding his duty in that behalf, but contriving and wrongfully intending to injure the plaintiff, did not nor would, when he was so requested as aforesaid, or within any reasonable time afterwards, pool or pen back the water in the said reservoir, but wholly refused and omitted so to do; and on the contrary thereof, the defendant contriving as aforesaid, on the day and year first aforesaid, and for a long time afterwards, to wit, from thence continually, until the commencement of this suit, wrongfully and injuriously kept and continued the said flood hatch open, and thereby during all that time prevented the water flowing into the said reservoir from being pooled and penned back therein; by reason whereof the said mill of the plaintiff could not during the time aforesaid be supplied with sufficient water for the working thereof; and by reason of the premises, the plaintiff, during all the time aforesaid, was hindered and prevented from working his said mill in so ample and beneficial a manner as he ought and otherwise would have done, and thereby lost and was deprived of divers great gains and profits, which he might and otherwise would have derived from the use of his said mill; and also by reason of the premises, he, the plaintiff, during the time aforesaid, to wit, on [*&c.*] and on

(*y*) In other counts "therein by means of a flood hatch of and belonging to the said reservoir for, &c."

(*z*) In some counts this averment of defendant's possession and his duty were omitted, and he was only charged with keeping and continuing the hatch open.

(*a*) Omitted in some counts.

divers other days afterwards, was forced and obliged to grind at other mills of other persons, divers large quantities of corn, to wit, 500 quarters of corn, which, but for the committing of the said several grievances by the defendant as aforesaid, he, the plaintiff, might and would have ground at his said mill; and in so doing he, the plaintiff, was necessarily put to great trouble and expense of his moneys, to wit, to the amount of £——, and lost divers profits which would otherwise have accrued to him, and was and is otherwise injured.

### 3. *For spoiling the Water of a Stream which flowed to the Plaintiff's Bleaching Ground.*

For that whereas the plaintiff, before and at the times of the committing the grievances hereinafter mentioned, was and from thence hitherto hath been and still is lawfully possessed of certain bleaching works, bleaching lands and premises, with the appurtenants, in the county aforesaid, and there, during all that time, used, exercised and carried on the trade and business of a bleacher, and bleached divers large quantities of cloth [*&c.*] there and thereby, until the committing of the grievances by the defendant hereinafter mentioned, made divers great gains and profits; and whereas †before and at the times of the committing of the grievances hereinafter mentioned, the plaintiff of right ought to have had and enjoyed, and still of right ought to have and enjoy the benefit and advantage of the water of a certain stream or watercourse situate in the county aforesaid, which during all that time of right ought to have run and flowed, and still of right ought to run and flow unto and into the said tenements and premises of the plaintiff in sufficient quantity and of good quality to be used by the plaintiff in his said trade or business of a bleacher, and also to water his cattle, and for the more convenient and beneficial occupation and enjoyment of the said bleaching works, bleaching lands and premises of the plaintiff; and whereas during all the time aforesaid, the defendant was and is possessed of certain lands and premises upon and near the said stream or watercourse higher up the stream thereof than the said premises of the plaintiff; Yet the defendant well knowing the premises, but wilfully contriving to injure the plaintiff in this behalf, while the plaintiff was so possessed of his said bleaching works, bleaching grounds and premises with the appurtenants, and so exercised his said trade and business there as aforesaid, and was so entitled to such water as aforesaid, to wit, on [*&c.*] and on divers other days and times between that day and the commencement of this suit, wrongfully and unjustly cast and deposited, and caused to be cast and deposited into divers great pits (*b*) and holes in his, the defendant's said lands and premises near to certain

(*b*) See a statement complaining of the discharge into a stream, of water, &c. from pits containing iron and copper water, Wright *v.* Williams, 1 M. & W. 77; 1 Tyr. & G. 375, S. C.

parts of the said stream or watercourse, and communicating therewith still higher in the stream thereof than the said premises of the plaintiff, and [also into and near to other parts of the said stream or watercourse higher in the stream thereof than the said premises of the plaintiff,] divers large quantities of [*&c.*] and other noxious articles, materials and ingredients, filth and refuse, which then filtered, drained, flowed and came in great quantities unto and into the said stream or watercourse higher in the stream thereof than the said bleaching works, bleaching grounds and premises of the plaintiff, and flowed and came down the said stream or watercourse unto and into the said bleaching works, bleaching grounds and premises of the plaintiff; By reason of which said several premises the water flowing and coming by the said stream or watercourse to the said bleaching works, bleaching grounds and premises, with the appurtenants of the plaintiff, during all the time aforesaid, hath been and is greatly infected and corrupted, and rendered unfit for the use of the plaintiff in his said trade or business, or for the bleaching of, [*&c.*] as the same otherwise would have been and injurious and destructive thereto, and also unfit for the use of his cattle there; and divers large quantities, to wit, 5000 yards of cloth [*&c.*] of the plaintiff, of great value, to wit, of the value of £——, which the plaintiff, during the time last aforesaid, had attempted to bleach there with the said water so coming and flowing as last aforesaid, were then stained, discolored and corrupted, and spoiled and rendered of much less use and value than the same otherwise would and ought to have been; and the plaintiff hath been obliged to incur a great expense, to wit, to the amount of £——, in and about endeavoring to whiten and cure the said cloth [*&c.*]; and the plaintiff hath also been prevented from bleaching other large quantities, to wit, 5000 yards of cloth [*&c.*] of the plaintiff, and from making great gains and profits thereby, to wit, to the amount of £——, as he otherwise might and would have done, and thereby also the plaintiff lost and was deprived of a sufficient supply and quantity of pure and clean water, fit and proper for the carrying on of his said trade or business, and was and hath been and is prevented from exercising his said trade or business in so ample and beneficial a manner as he otherwise might and would have done; and the plaintiff hath been and is in other respects injured in his said trade or business and otherwise; and has also been prevented from watering his cattle upon his said premises in so commodious a manner as he otherwise would and ought to have done, and has been obliged to procure water elsewhere for the purposes aforesaid at a great expense, to wit, at an expense of £——, and his said premises have been and are much deteriorated in value.

4. *Against Commissioners of a Level for stopping up a Drain through which the Water from Plaintiff's Land was carried away therefrom.*

For that whereas the plaintiff, before and at the times of the committing by the said defendants of the several grievances hereinafter mentioned, was and from thence hitherto hath been and still is possessed of divers, to wit, 1000 acres of arable land, 1000 acres of pasture land, and 1000 acres of other land, situate in the county aforesaid, and during those times the plaintiff was and still is of right entitled that the waters from time to time collecting and being in and upon the said lands of the plaintiff should run and be drained, discharged and carried off and away from the same lands unto and into and through a certain drain situate in the county aforesaid, and called ——, and from thence through other drains and places unto and into [*the sea*]; Yet the defendant, well knowing the premises, but intending to injure the plaintiff whilst the plaintiff was so possessed of the said lands, and so entitled as aforesaid, to wit, on [*&c.*] and on divers other days and times between that day and the commencement of this suit, wrongfully and injuriously cast and threw and placed divers large quantities of earth, stones, soil and rubbish in the said drain, and there kept the same thence hitherto and thereby and therewith wrongfully stopped and choked up and obstructed the said —— drain, and kept and continued the same so stopped and choked up and obstructed for a long space of time, to wit, continually thence hitherto, whereby divers large quantities of the waters which from time to time during that time collected, and were in and upon the said lands of the plaintiff, were during all that time and still are wrongfully and injuriously obstructed, hindered and prevented from running and being drained, discharged and carried off and away from the said lands of the plaintiff, unto, into and through the said —— drain away from the said lands of the plaintiff, as they otherwise might and would have done, and were then and there penned in and driven back upon and flowed and ran into and upon the said lands of the plaintiff, and accumulated thereon, and by reason thereof the said lands of the plaintiff became and were and are rendered wet and swampy, and were and are greatly injured and rendered unproductive; and thereby also divers, to wit, twenty rams, 2000 sheep, and 2000 lambs of the plaintiff, of great value, to wit, £——, then lying and being and depasturing upon the same lands, became and were diseased and greatly injured and rendered of no use or value to the plaintiff; and divers of them, to wit, ten rams, 1000 sheep and 1000 lambs, then languished and died; and also by reason of the premises, divers crops of corn, grain and hay, to wit, 500 acres of corn, 500 acres of grain and 500 acres of hay of the plaintiff, of great value, to wit, £——, growing and being in and upon his said several lands failed, and were spoiled, damaged and destroyed; and also by reason of the premises, the plaintiff hath necessarily incurred divers great expen-

ses of his moneys, to wit, to the amount of £——, in endeavoring to cultivate his said lands and restore the same to their former good state and condition and incidental thereto, and to prevent and repair the said damage, and the plaintiff hath been and is otherwise much injured.

5. *For improperly mooring a Vessel in the Thames opposite the Plaintiff's Wharf, and thereby impeding the progress of Vessels thereto.* (*c*)

For that whereas the plaintiffs, before and at the times of the committing of the grievances by the defendant as hereinafter mentioned, were lawfully possessed of a certain public open and lawful quay or wharf called ——, adjoining to and abutting upon the river Thames between London Bridge and the Tower of London, within the Port and City of London aforesaid, and all the liege subjects of our lady the queen before and at the time aforesaid, actually and of right had and still of right ought to have a free passage and navigation in, upon and along the said river, and in front of the said quay or wharf for their vessels, craft and barges going to and returning from the said quay or wharf upon lawful occasions; and whereas also the plaintiffs, before and at the time of the committing of the grievances thereinafter mentioned, carried on the trade and business of a wharfinger at, in and upon the said quay or wharf; and whereas also before and at the time aforesaid divers liege subjects of our lady the queen were accustomed to frequent the said quay or wharf with their vessels, crafts and barges, and to load and unload at, from and upon the said quay or wharf upon and out of their said vessels, crafts and barges, their lawful goods, wares and merchandizes; and by reason of the premises, the said plaintiffs during all the times aforesaid were accustomed to make and did make great gains and profits by the lawful wharfage dues and fees of right due to them on the occasions aforesaid, and by their profits and charges in and about the loading and unloading the said goods, wares and merchandize; Yet the defendant well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiffs in and about the premises, heretofore, to wit, on the —— day of —— A. D. ——, and on divers other days and times between that day and the commencement of this suit, wrongfully and injuriously and without the consent of the plaintiffs and without and otherwise than for the purpose of loading or unloading goods, wares, merchandize or other things at the said quay or wharf, brought up, moored and fastened, and caused to be brought up, moored and fastened, a certain large ship or vessel in the said river, so and in such manner that a large part of the said ship or vessel, to wit, fifty yards in length thereof, lay before, across and along side of the said

(*c*) See Wyatt *v.* Thompson, 1 Esp. R. 252.

quay or wharf, and on the days and times aforesaid kept and continued the said ship or vessel so moored and fastened, and so laying as aforesaid, for long spaces of time, to wit, for five hours on each of the said days and times, the same being on all the said days and times an unreasonable and unnecessary length of time, and thereby during all the time aforesaid greatly obstructed and impeded the passage and navigation to and from the said quay or wharf, upon and along the said river before and in front of the said quay or wharf, and during all that time hindered and prevented the liege subjects of our lady the queen from going to and returning from the said quay or wharf with their vessels, crafts and barges, upon and along the said river for their lawful purposes, as they had before been used and accustomed to do, and as at the times aforesaid they otherwise might and would have done; by means of which said premises, the plaintiffs, during all the times aforesaid, were hindered and prevented from possessing and enjoying the said quay or wharf, and from carrying on their said trade and business there in so large, ample and beneficial a manner as they otherwise might and would have done; and so the plaintiffs in fact say that by reason of the premises aforesaid, they have, during all the time aforesaid, lost and been deprived of great gains and profits, to wit, to the amount of £——, which otherwise would have arisen and accrued to them from their lawful possession and enjoyment of the said quay or wharf, and from carrying on their said trade and business there as aforesaid.

### †6. *Other Forms for Obstructions, Nuisances, &c. to Watercourses, &c.*

[Form for diverting water from plaintiff's mill, &c. by making cuts from the stream, by widening cuts, by not keeping the banks in repair, &c.; Vooght *v.* Winch, 2 B. & Ald. 662; 2 Chit. Pl. 5th ed. 788 to 794, 6th ed. 556 to 562; Williams *v.* Morland, 2 B. & C. 910; 4 D. & R. 583.

General count, not showing mode of diversion of water from mill; Frankum *v.* Earl of Falmouth, 2 Ad. & E. 452; 1 Harr. & W. 1, S. C.; see *ante*, 526, tit. "Easement."

For lowering banks and making a weir and thereby impeding current and causing it to flow irregularly to plaintiff's mill; Liggins *v.* Inge, 7 Bing. 682; 5 M. & P. 712, S. C.

For suffering a ditch to be choked for want of cleansing, which it was defendant's duty to do as occupier of an adjoining close, whereby the water overflowed plaintiff's close; 2 Chit. Pl. 6th ed. 562.

For stopping a gutter in defendant's yard through which the refuse water and eaves droppings from plaintiff's house were carried away; Thomas *v.* Thomas, 1 Gale, 62; 2 C. M. & R. 35.

For injuring plaintiff's land by causing a watercourse to flow with unusual force, &c.; Williams *v.* Morland, *supra.*

For removing a hatch, whereby plaintiff could not work his mill; 2 Chit. Pl. 5th ed. 794, 6th ed. 563. The like by a *reversioner;* Greenslade *v.* Halliday, 6 Bing. 379.

Against another miller for an improper elevation of his hatch and mill head; Saunders *v.* Newman, 1 B. & Al. 258; *ante*, 604.

For an injury to the plaintiff's reversion in a close by an interruption of a right to irrigate the same by a watercourse; 2 Chit. Pl. 5th ed. 794 a, 6th ed. 563.

Same Form in Greenslade *v.* Halliday, 6 Bing. 379.

For the like injury, and for discharging into the stream water, &c. from pits in which iron was deposited and from copper works; Wright *v.* Williams, 1 M. & W. 77; 1 Tyr. & G. 375, S. C.

Against the owner of a wharf for placing a tree in the Thames, whereby plaintiff's vessel was injured; 2 Chit. Pl. 5th ed. 794; 6th ed. 564.

For obstructing plaintiff in his right to water cattle at a pond, and take the water for domestic purposes; Manning *v.* Wasdale, 1 N. & P. 172.

For diverting the course of a navigable canal, using an excess of water for defendant's mill, and leaving open flood gates, whereby plaintiff's barges could not proceed; 2 Chit. Pl. 5th ed. 795 to 799 a, 6th ed. 565 to 568; three counts.

Against a canal company for not managing the canal according to an act of parliament; Blackmore *v.* The Glamorganshire Canal Company, 3 Y. & J. 60.

For injury to plaintiff, as a wharfinger, by mooring a ship opposite to his wharf; *ante*, 608, Form 5.]

## WAYS. (*d*)

See "Nuisances," "Watercourses."

(*d*) See in general as to public and private ways, Vin. Ab. and Com. Dig. tit. "Chimin;" Bac. Ab. "Highways;" 1 Saund. 326 n. b; Burns J. tit. "Highways;" 2 Stark. Ev. tit. "Way," 2nd ed. 913; Harr. Ind. and Add. tit. "Way." No action lies for an obstruction in a common highway, unless the plaintiff can show special damage; see Wilkes *v.* Hungerford Market Company, 2 Bing. N. C. 281. A private way is claimed either by *grant*, or reservation, or by *prescription*, or from *necessity*. The provisions of the late act 2 & 3 Will. 4, c. 71, s. 2, as it relates to the claim of a right of way by prescription, have been fully noticed, *ante*, 601, n. (*m*). And the late decisions explaining the provisions of the statute; Bright *v.* Walker, 4 Tyr. 502; 1 C. M. & R. 211; Beasley *v.* Clarke, 2 Bing. N. C. 705, &c. are fully cited in the note to the plea in *Trespass*, "Way," *post*, justifying under a right of way. Case is the only remedy for obstructing a right of way, and it seems that form of action might be adopted where the obstruction arises from a building erected by the defendant at one time, partly upon the plaintiff's land and partly upon the defendant's land, over which the way extended; *ante*, 601, n. (*m*).

### 1. *Common Form for obstructing a Private Right of Way.* (*e*)

For that whereas the plaintiff, before and at the times of the committing of the grievances by the defendant as hereinafter mentioned, was, and from thence hitherto hath been and still is lawfully possessed of a certain wharf, close and premises, [*or* "a certain messuage"] with the appurtenants, situate in the county aforesaid, and [by reason thereof (*f*)] the plaintiff, during all the time aforesaid, ought to have had (*g*) and still of right ought to have a certain way from the said wharf, close and premises unto, into, through and along a certain other close in the said county, and from thence unto and into a certain common or public highway there, and so from thence back again from the said common highway, unto, into, through and along the said close secondly above mentioned, unto and into the said wharf, close and premises respectively so in the possession of the plaintiff, for himself and his servants *on foot*, and with *horses*, *mares*, and *geldings*, *carts*, *waggons* and other carriages (*h*) to go, return, pass, and repass every year, †and *at all times of the year*, at his and their free will and pleasure (*i*) [as to the said wharf, close and premises with the appurtenants of the plaintiff belonging and appertaining (*k*)]; Yet the defendant well knowing the premises, but wrongfully and unjustly intending to injure the plaintiff in that behalf and to deprive him of the use and benefit of his said way whilst the plaintiff was so possessed and

(*e*) See Form, &c. Bright *v.* Walker, 1 C. M. & R. Rep. 211; 2 Chit. Pl. 5th ed. 807, 6th ed. 574. Way across a stream; Bower *v.* Hill, 1 Bing. N. C. 549; 1 Hodg. R. 45, S. C. Form for disturbing a way *leased* to the plaintiff; Kooystra *v.* Lucas, 5 B. & Ald. 830. A reversioner may sue if *his* interest be injured; see *ante*, 588, n. (*q*); Form, 2 Chit. Pl. 5th ed. 810 a, 6th ed. 577.

(*f*) The words "and by reason thereof," appear to be in no case necessary, and may in some instances be incorrect, and perhaps it is better as a general rule to omit them; see authorities *infra*, n. (*k*), and *ante*, 602, n. (*m*). They may however be used where the way is claimed by virtue of twenty years uninterrupted enjoyment; see Bright *v.* Walker, 1 C. M. & R. 211; 4 Tyr. 502, S. C.

(*g*) This general allegation of the right to a way in a declaration for disturbance was sufficient before the Prescription Act, 2 & 3 Will. 4, and is expressly sanctioned by that statute; *ante*, 498, n. (*b*).

(*h*) Of course this statement will correspond with the nature of the claim, and should be strictly correct; see *post*, "*Trespass*;" Pleas, "Way," and query, whether the provision in the New Rules "V. Trespass," that "in *all actions* in which such a right of way as aforesaid" (that is, with carriages and cattle and on foot in the same plea,) "*is so pleaded* that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively"—extends to a declaration for obstruction. Where the extent of the right is doubtful, introduce a second count, varying the description of the right; but in one case which occurred lately, a judge at chambers refused to allow a second count of this kind to stand, except under the penalty of the rule as to costs, and upon an indorsement on the summons that a distinct right of way was claimed on that count. The power of amendment under 3 & 4 Will. 4, c. 42, s. 24, is very large, but where the error may have misled the defendant and induced him to plead differently to what he might have done had the averment been correct, the power will not always be applied to the plaintiff's relief; see Frankum *v.* Earl of Falmouth, cited *post*, 616.

(*i*) See the various points as to describing the way, *post*, "*Trespass*," Pleas, "Way."

(*k*) This allegation is not, it seems, ever necessary, and it would seem to be inaccurate where the way is claimed by express grant or agreement; see *ante*, 602, n. (*m*); 2 Chit. Pl. 6th ed. 575, n. (*o*), cites 4 East, 107, 6 *id.* 438, 15 *id.* 25. It will not however render the declaration defective, although the claim arise by virtue of twenty years adverse enjoyment of the way; Bright *v.* Walker, 1 C. M. & R. 211.

entitled as aforesaid, to wit, on [*&c.*], on divers other days and times between that day and the commencement of this suit, in the county aforesaid, wrongfully and unjustly (*l*) placed and erected divers, to wit, five gates and twenty posts, and put and placed divers large quantities of planks, wood and timber respectively, in and across the said way, to which the plaintiff was so entitled, and there wrongfully kept and continued the said gates, posts, planks, wood and timber, in the same way as aforesaid, for a long time, to wit, thenceforth hitherto, and thereby during all the time aforesaid, the said way was and still is greatly obstructed and stopped up, and the plaintiff could not nor can he enjoy the same, and was and is deprived of the use and benefit thereof. (*m*)

### 2. *Other Forms for obstructing Ways, &c.*

[For obstructing a *public* highway showing special damage to the plaintiff as occupier of a shop, &c. on the highway; and law; Wilkes *v.* Hungerford Market Company, 2 Bing. N. C. 281; Hodg. 281, S. C.; Vallance *v.* Savage, 7 Bing. 595; 5 M. & P. 576, S. C. Another general form, 2 Chit. Pl. 5th ed. 599 b, 6th ed. 404.

For obstructing the plaintiff's access to a pond, the water of which plaintiff was entitled to for his cattle, &c.; Manning *v.* Wasdale, 1 N. & P. 172.

†For obstructing a Rector's way to take *tithes;* James *v.* Dods, 2 C. & M. 266; 4 Tyr. 101; 2 Chit. Pl. 5th ed. 810, 6th ed. 578.

Case for not repairing a private way; Rider *v.* Smith, 3 T. R. 766.]

## WINDOWS.

See "Ancient Lights."

## WITNESSES.

[Forms of declaration against a witness for disobeying a *subpœna;* Mullett *v.* Hunt, 1 C. & M. 752; Stokes *v.* White, 1 C. M. & R. 223; Betteley *v.* M'Leod, 4 Scott, 131; 3 Bing. N. C. 405; 2 Chit. Pl. 5th ed. 757, 6th ed. 531; see 3 Chit. G. P. 828 to 834.]

(*l*) It seems a general allegation of obstruction, not showing the means, would be incorrect; see *ante*, 603, n. (*s*); Tebbutt *v.* Selby, N. & P. 710, and *id.* 716, 717, per Lord Denman, C. J. and Patteson, J.; see however form 2 Chit. Pl. 6th ed. 576.

(*m*) It is not necessary to prove any specific injury; see *ante*, 603, n. (*t*).

# CASE—PLEAS, &c.—NOT GUILTY.

## OBSERVATIONS ON THE PLEA OF NOT GUILTY.

"In actions on the *case* the plea of *not guilty* shall operate as a denial only of the *breach of duty or wrongful act* alleged to have been committed by the defendant, and not of the facts stated in the *inducement*; and no other defence than such denial shall be admissible under that plea. All other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. *Ex. gr.* In an action on the case for a *nuisance* to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action on the case for obstructing a right of *way*, such a plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods, the conversion only and not the plaintiff's title to the goods. In an action of *slander* of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of the fact of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged. In actions for an *escape* it will operate as a denial of the neglect or default of the sheriff, or his officers, but not of the debt, judgment, or preliminary proceedings. In this form of action against a *carrier*, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received. All matters in *confession and avoidance* shall be pleaded *specially*, as in actions of *assumpsit*;" New Rules:—Pleadings IV. in Case.

Before the New Rules the plea of not guilty put in issue the *inducement*, or introductory statement, in the declaration of the *plaintiff's title or right*, or of any preliminary proceedings in reference to the subject-matter of the action or thing affected or injured by the defendant; and 2dly, the *acts* committed by him; and 3dly, it enabled the defendant,

(admitting the plaintiff's title and interest, and the injurious acts complained of,) to contend †that the cause of action had been *extinguished* or *discharged* by subsequent accord and satisfaction, &c.

The great object of the New Rules, in reference to the plea of not guilty in *Case*, appears to have been, the restriction of its operation to a *mere denial of the defendant's acts constituting the tort complained of*; and 1st, to render it an admission of the plaintiff's *title or interest* in the matter or thing affected; and 2dly, to disable the defendant from contending under it that the cause of action has been *since satisfied or discharged*. The New Rules destroy the ancient doctrine as regards these two lines of defence, in order that the plaintiff may not be taken by surprise at the trial, and that the expense of unnecessary evidence may be avoided.

There is an evident distinction between the *title* of the plaintiff, and the *wrongful act* of the defendant. And the New Rules, for the purposes of pleading, recognize this distinction, and evince an intention that only the defendant's wrongful act, (in other words, *his case*, as contrasted with the plaintiff's title,) should be controverted by the plea of not guilty.

In an action on the *case* the declaration usually contains a short prefatory allegation of the plaintiff's title or interest, or of other matter preliminary to the injurious act complained of. Thus, in the instances put in the Rules by way of illustration, the declaration for a nuisance to a house, states that before the committing of the grievance, the plaintiff was possessed of the house, (*ante*, 576, 581); and the plea of not guilty would not deny that fact. In case for obstructing a watercourse or way, or the exercise of a right of common, there is a prefatory allegation of the plaintiff's right to the enjoyment of the water, or way, or common; which is not disputed by not guilty; see instance, Dukes *v.* Gostling, 1 Bing. N. C. 588, 589; 1 Scott, 570; 3 Dowl. P. C. 619. In case for injuring the plaintiff's reversion in a house or land, the declaration contains a short inducement of the title (*ante*, 541 and 598,) which can only be denied by an express traverse. And we have seen that in libel and slander it is often necessary to introduce a special inducement of the plaintiff's trade, (*ante*, 551 and 558,) or of particular facts, (*ante*, 549 and 557,) to render the matter actionable: and in these cases *not guilty* admits such introductory statement. The instances of actions against *sheriffs* for escapes, in which the preliminary proceedings are stated; and against an agent and carrier for neglect, in which the retainer of the former and delivery of goods to the latter as a carrier, to be conveyed, &c. are alleged, may also be mentioned;—not guilty being insufficient to deny those several matters. So in an action for a warranty there is an inducement of a *sale*, which is not denied by not guilty, (see *infra*.)

It will be observed that the rule provides, that the plea of not guilty shall operate only as a denial of the "*wrongful* act" alleged to have been committed. And before the decision in Frankum *v.* Earl of Falmouth, 2 †Ad. & E. 452; 4 N. & M. 330; 1 H. & W. 1; 6 C. & P. 529, S. C.; it was contended that the plea therefore put in issue not only the question

whether the act complained of was committed, but also its *wrongful character*, and, consequently, involved the question of plaintiff's right; for it was argued, if there were no right there was no "*wrongful*" act. But the Court supported the distinction alluded to, in reference to the non-operation of the plea of not guilty upon the allegation of the plaintiff's title or right. The declaration was in case for obstructing the flow of water to plaintiff's mill, and it alleged that the plaintiff was *possessed* of a mill, and that the watercourse *ought* to have flowed to it, but defendant "wrongfully diverted" the water. The defendant pleaded *not guilty*. It appeared at the trial that the mill had been erected within twenty years, and a verdict was found for the defendant. An application was made for a new trial on the ground that not guilty put in issue merely the *fact* of diversion, and that fact having been proved at the trial the issue ought to have been found for the plaintiff. The Court were of this opinion and a new trial was granted. In the course of the argument Patteson, J. said, "if the word *wrongfully* in the declaration makes the plea of not guilty put in issue the *right* of the plaintiff, there is an end of our rule of pleading;" and again, "your argument goes this length, that by reason of the use of the word *wrongfully* in declarations of this sort, it would not be necessary in any such case to plead specially." The judgment of the Court was, "we have conferred with all the judges upon the point reserved, and we all think that the word *wrongfully* does not operate to put in issue the circumstance of the act being wrongful."

In commenting upon the word "conversion" in Trover, (*the pleadings in which will be considered hereafter,*) used in the New Rules, in illustration of the effect of the plea of not guilty, Parke, B. (in delivering judgment in Stancliffe *v.* Hardwick, 2 C. M. & R. 11; 1 Gale, 127; 3 Dowl. P. C. 762, S. C.) said, "a reference to the context enables us to discover the meaning of this term. It is intended to confine the operation of the plea to a denial of the *fact* of conversion only, and not to allow the defendant to give evidence of its *legality*, any more than in a plea of not guilty to an action on the case for obstructing a right of way, the defendant could be allowed to show that the obstruction was *lawful;* or, under the like plea, to an action for diverting a watercourse, to give evidence that such diversion was *justifiable* by license or prescription. The latter point was decided in the case of Frankum *v.* Earl of Falmouth, (*supra*); and the effect of the New Rules is, therefore, to alter the previous operation of the plea of not guilty, not merely by preventing it from involving a denial of the *inducement*, as it did before, but also by confining it to a *simple denial of the breach*, and by excluding all *matters in confession and avoidance.*"

But the plea of not guilty not only denies the *mere act* charged to have been committed by the defendant, but also such other facts stated in the *declaration* as give it a *tortious character*, and constitute the *injury*, or *gist* of the action, *without amounting to a recital of the plaintiff's title, or right, or of any preliminary proceeding.* The *gravamen* is involved in the *issue*

of guilty or not guilty. Thus in Cotton *v.* Brown, 3 Ad. & E. 312; 4 N. & M. 831; the Court held, that in case for a malicious prosecution the plea of not guilty put in issue the question of probable cause. Denman, C. J. said, "the *injury* complained of is not merely in the indicting alone, nor in the indictment being wrongful, but in *maliciously* indicting, and in doing so without *reasonable or probable cause.*" And Patteson J. said, (during the argument,) "in Frankum *v.* Earl of Falmouth, the attempt was under the word 'wrongfully' in case for diverting water, to bring into question the *plaintiff's right* of possession," and (in giving his judgment) his lordship observed, "some cases have been referred to, in which the plaintiff makes an *assertion of right* and then complains of an injury done in respect thereof, and there it is proper for the defendant to answer by denying the right. But here there is no such assertion of right; *the whole matter alleged in the declaration is an act of injury.*"

This appears to be the true principle; and, in accordance therewith, it has been decided, that in case for keeping a *mischievous dog*, the *scienter* is denied by not guilty, as well as the dog's propensity, and that the defendant kept the animal; Thomas *v.* Morgan, 5 Tyr. 1085; 2 C. M. & R. 496; 1 Gale, 172; and that in an action for the *seduction* of the plaintiff's servant, such plea denies not only the seduction, but also that the party was the plaintiff's *servant;* Holloway *v.* Abell, 7 C. & P. 528; the *scienter* in the one case, and the service in the other, being the *gist* of the action; and there being nothing of a wrongful character to leave to the consideration and decision of the jury, if those points were excluded from proof on such issue. So, in case for a breach of warranty, the plea of not guilty denies the warranty and breach thereof, (but not the *sale*); Spencer *v.* Dawson, 1 Mo. & R. 552; Mash *v.* Densham, *id.* 442. And it is settled that in case for a libel or slander, that plea enables the defendant to disprove malice, by showing that the scandal was a privileged or confidential communication on a lawful occasion; Lillie *v.* Price, 1 N. & P. 16; 5 Dowl. P. C. 432.

It should be remembered that (as observed by Alderson, B. in Edmunds *v.* Groves, 2 M. & W. 642,) "the *pleadings* are not before the jury, but only the *issue.*" And that even in cases where a plea expressly traverses only a particular fact stated in the declaration, such "admission on the record is merely a waiver of requiring proof of those parts of the record which are not denied, the party being content to rest his claim on the other facts in dispute; but if any inferences are to be drawn by the jury, they must have the facts from which such inferences are to be drawn proved like any other facts."

†The effect of the plea of not guilty in every case of ordinary occurrence is pointed out in the observations appended to the following pleas. We may here add, that in case for a malicious prosecution, &c. the plea of not guilty appears not to put in issue the *determination* of the proceedings, which is strictly no part of the defendant's tortious conduct; Drummond *v.* Pigou, 2 Bing. N. C. 114; 2 Scott, 228; 1 Hodg. 190; and that

in an action against a carrier for neglect, a defence founded on the Carriers' Act should, it seems, be pleaded specially; Syms *v.* Chaplin, 1 N. & P. 129.

The proviso in the statute 3 & 4 W. 4, c. 42, s. 1, under which the New Rules were made, enacts, "no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the *special matter* in evidence in any case where he is now or hereafter shall be entitled to do so by virtue of any act of parliament now or hereafter to be in force." Therefore an overseer of the poor or other officer, to whom the general issue is given by statute, may, under the plea of not guilty, prove not only the character and authority in respect of which he justifies, but may dispute and disprove the plaintiff's right to goods which form the subject of the action, and the seizure of which is justified: the plea in such case puts in issue the whole matter of defence; Horne *v.* Davey, 4 Ad. & El. 892; 6 N. & M. 356; see Wells *v.* Ody, 2 C. M. & R. 128. In these cases, it seems, that the Court will not allow the defendant to plead not guilty, and also a justification under his official character; Neale *v.* M'Kenzie, 1 C. M. & R. 61: but he may justify specially instead of pleading the general issue; Hayselden *v.* Staff, 5 Ad. & E. 160.

### 1. *Plea of Not Guilty.*

In the ——. On the —— day of —— A. D.——.

And the defendant, by —— his attorney, [*or* "in person, &c."] says that he is not guilty [*or if there be several defendants who plead jointly, say*, "that they are not, *nor are any*, nor is either of them guilty"] of the said supposed grievances [*or* "premises,"] above laid to his ["their"] charge, or of either of them or any part thereof, in manner and form as the plaintiff hath above thereof complained against him [*or* "them"] and of this the defendant puts himself, [*or* "defendants put themselves"] upon the country, &c.

### 2. *Not Guilty to part of a Declaration.*

And the defendant, by [*&c.*], as to the supposed grievances in the said first count of the said declaration mentioned, [*or* "as to the said declaration," *or* "first count," "so far as it relates to the speaking and publishing the following words of and concerning the plaintiff, to wit, ——," *&c. or as the case may be,*] says that he is not guilty of the last mentioned supposed grievances, or of either of them or any part thereof as in the declaration alleged; and of this the defendant puts himself upon the country, &c.

### 3. *The Similiter or Replication to Not Guilty.*

[See Form 2, *ante*, 21.]

## ACCORD AND SATISFACTION.

### *Plea of Accord and Satisfaction.* (*a*)

The defendant, by —— his attorney, says, that after the committing of the said supposed grievances in the declaration mentioned, and before (*b*) the commencement of this suit, to wit, on [*&c.*], he delivered to the plaintiff, and the plaintiff then accepted and received from him the defendant certain goods, to wit, —— of great value, [*or* "paid to the plaintiff, who then received from the defendant a certain sum, to wit, £——,"] in full satisfaction and discharge of the said grievances in the declaration mentioned, and of all the damages by the plaintiff sustained by reason of the committing thereof; and this the defendant is ready to verify, &c.

## AGENTS. (*c*)

### *Plea denying the Retainer, &c.* (*c*)

And the defendant, by —— his attorney, says that the plaintiff did not retain or employ him [*or* "deliver to him the said goods and chattels in the declaration mentioned or any part thereof, for the purpose or upon the terms in the declaration mentioned," *as the case may be*,] as in the declaration alleged; and of this the defendant puts himself upon the country, &c.

## ANIMALS.

[See "Mischievous Animals."]

(*a*) Since the New Rules this must be specially pleaded; see Forms in assumpsit and notes, *ante*, 206 to 214.

(*b*) If after writ, see *ante*, 368, Form 7; Tidd, 9th ed. 626, note (*h*).

(*c*) *Not guilty*, (see *supra*, 618, Form 1,) would only put in issue the alleged breach of duty or wrongful act. It would not deny the *retainer* or other facts stated in the inducement, as the delivery of goods to be sold, &c.; see *ante*, 614. The retainer, &c. should be specially traversed as above; see Forms in *assumpsit*, *ante*, 217, &c.; see *post*, "Attornies," "Bailees." It would be bad pleading to traverse the obligation or duty charged by a plea, that "it was not the duty of the defendant to," &c., this being a matter or question of law; see Trower *v.* Chadwick, 3 Bing. N. C. 334.

## ANCIENT LIGHTS. (*d*)

### 1. *Denial that Plaintiff was possessed of the House.* (*e*)

And the defendant, by —— his attorney, says that the plaintiff was not at either of the said times, when &c., possessed of the said messuage with the appurtenants in the declaration mentioned, or any part thereof, as in the declaration alleged; and of this the defendant puts himself upon the country, &c.

### 2. *Denial of the alleged Right to Light, &c.* (*f*)

The defendant, by —— his attorney, says that there were not of right at or during either or any part of the said times, when &c., any or either of the said windows through which the light or air ought to have entered, or still of right ought to enter, in the manner and form or for the purpose in the declaration alleged; and of this the defendant puts himself upon the country, &c.

## ARBITRAMENT AND AWARD.

[See forms in assumpsit and notes, *ante*, 225, 226. These forms may

(*d*) See Forms of declarations and notes, *ante*, 497. The plea of *not guilty* (see Form 1, *ante*, 618,) puts in issue the mere *fact* of *obstruction*. It does not deny the plaintiff's possession of the house, or that he was entitled to the enjoyment of the light as charged in the declaration, or that the obstruction was by plaintiff's consent; and see Frankum *v.* Earl of Falmouth, 4 N. & M. 330; 2 Ad. & E. 452; 1 M. & W. 1; 6 C. & P. 529, S. C.; 5 N. & M. 268 a, cited *post*, tit. "Watercourse," and *ante*, 615, 616. See Form of plea of license, *post*, "License."

(*e*) This plea would be proper where the action is incorrectly brought by a landlord upon his possession, instead of charging an injury to his *reversion*; see *ante*, 541, Form 1; the house having been in the occupation or holding of a tenant when the grievance existed. The next form is proper where the exclusive right to the light is denied; see *ante*, 614.

(*f*) See *supra*, note (*d*). This plea puts the plaintiff on proof of his right by twenty years uninterrupted enjoyment, &c.; see 2 & 3 W. 4, c. 71, s. 3, *ante*, 497, note (*b*); or by grant. It would seem to be the proper form where the defendant contends that the right has been lost, by the mode of the enjoyment of the light having been essentially altered by the plaintiff himself to defendant's prejudice, &c.; see Garritt *v.* Sharp, 3 Ad. & E. 325, and form there, *ante*, 498, note (*b*); but it would not be correct (as it seems from the report was done in Garritt *v.* Sharp,) to deny the right, and also the obstruction, in one and the same plea. A special plea of mere non user would be bad; see Manning *v.* Wasdale, 1 N. & P. 172. The statute, 2 & 3 W. 4, which sanctions the general form of claiming the right to light in a declaration for obstructing it, (see *ante*, 498, and note (*b*),) provides that "if the general allegation be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in *evidence to sustain or rebut such* allegation."

be readily adapted to a plea in case, saying, "after the committing of the said supposed grievances, &c.

## ATTORNEY. (*g*)

## †BAILEES.

[As to the effect of "*not guilty*," see tit. "Agents," *ante*, 619. The bailment, if denied, must be specially traversed, as that "plaintiff did not let to hire the said supposed [*&c.*], to the defendant," *modo et formâ*, concluding to the country. Forms of declarations, *ante*, 502 to 504.]

## BANK OF ENGLAND, AND BANKERS.

[See Forms, &c. referred to, *ante*, 504. The plea of not guilty would merely deny the default or breach of duty, and would admit the inducement of plaintiff's *title* or right. See form of plea by bankers sued for not paying a check of their customer; Whittaker *v.* Bank of England, 5 Tyr. 253; 6 C. & P. 700, 702, S. C.

## BOOKING OFFICE KEEPERS.

[See "Waggon Office Keeper."]

## CARRIAGES. (*k*)

### 1. *Plea that Plaintiff was not possessed of the injured Carriage, &c.*

And the defendant, by —— his attorney, says that the plaintiff was

(*g*) Not guilty would only deny the alleged breach of duty, as neglect, &c., or misconduct, and not the retainer of defendant as attorney, or other matter of inducement stated in the declaration; see Form and note, *ante*, 619, tit. "Agents."

(*k*) See declarations for careless driving, *ante*, 504 to 506, and notes *id.* The plea of *not guilty* would merely put the plaintiff upon proof that defendant was guilty of the alleged acts of carelessness or unskilfulness, and thereby caused the injury complained of. It does not deny the plaintiff's possession of the damaged carriage. It has not been unusual, where the declaration charges as inducement defendant's possession of a carriage, and that he had the charge thereof by his servant,

not at the said time, when &c., possessed of the said [carriage] in the declaration first-mentioned as therein alleged; and of this the defendant puts himself upon the country, &c.

### 2. *Plea that the Accident was occasioned partly by Plaintiff's Negligence.* (*i*)

And for a further plea in this behalf the defendant says, that before and at the time when &c., the defendant was driving his said cabriolet and horse in and along the said public and common highway by his said servant, the said horse and cabriolet of the plaintiff then also at the said time when &c., being and going in and along the said highway, and that the said horse and cabriolet of the plaintiff at the said time when &c., were so carelessly, negligently and improperly driven, directed and managed in and along the said highway, near to the said cabriolet of the defendant, *that by reason thereof as well as by the default of the defendant* by his said servant, the said cabriolet of the defendant then was driven upon and against the said horse and cabriolet of the plaintiff, and thereby the said horse and cabriolet of the plaintiff, sustained the said injury in the said declaration mentioned; and this the defendant is ready to verify, &c.

## CARRIERS. (*k*)

### 1. *Plea by Carrier denying the Delivery of the Goods.* (*l*)

And the defendant, by —— his attorney, saith that the plaintiff did not

to deny specially (if the facts warrant such plea,) that "defendant was not possessed [*&c.*] nor had he the care, government," &c., concluding to the country.

(*i*) No action lies where each party is equally in fault; *ante*, 505 note (*i*); *post*, tit. "Ships;" Flower *v.* Adams, 2 Taunt. 315. Where the defence is, that defendant was not guilty of *any* carelessness, &c., and that plaintiff was *wholly* to blame, not guilty would seem to be the proper plea in case

(*k*) By the new Rules, "in *case* against a carrier, the plea of not guilty will operate *as a denial of the loss or damage*, but not of the receipt of the goods by the defendant for hire, or of the purpose for which they were received;" see declarations in *case* against carriers, *ante*, 506 to 508. The plaintiff must prove some non-performance of the carrier's duty, as that he has not delivered the goods at the place, &c.; see per Coleridge, J., Gilbart *v.* Dale, 1 N. & P. 24, 25. Where the defence is founded upon the provisions of the *Carriers' Act*, 1 W. 4, c. 68, cited *ante*, 94 note (*p*), requiring that the value of goods of a certain description should be declared, &c., there should be a special plea accordingly; Syms *v.* Chaplin, 1 N. & P. 129; see Form 1, in *assumpsit*, *ante*, 284, and another form in *assumpsit*, where the goods were delivered to a servant of the defendant, not at a receiving house, Syms *v.* Chaplin; see Boyce *v.* Chapman, 2 Bing. N. C. 222; 2 Sc. 365; 1 Hodg. 338. These forms will equally apply in *case*. As to the replication to a plea under the Carriers' Act, see *infra*, 623, Form 3. By the 10th section of the Carriers' Act, 11 G. 4 and 1 W. 4, c. 68, money may be paid into Court by a carrier sued for the loss of, or injury to goods; see "Payment," *post*.

(*l*) See *supra*, note (*k*), and the form in assumpsit, *ante*, 283; form of plea by ship owner, Major *v.* White, 7 C. & P. 42; Quiggin *v.* Duff, 1 M. & W. 174; 1

deliver to him the defendant, nor did he receive the said goods and chattels in the declaration mentioned or any part thereof, [for the purpose in the declaration mentioned,] in manner and form as the plaintiff hath above alleged; and of this the defendant puts himself upon the country, &c.

### 2. *Plea by a Carrier, sued on his common law liability, that the Goods (Oil) were lost by being put in an insecure Cask.* (*m*)

And for a further plea in this behalf, as to the not safely and securely delivering the said hogshead of oil for the plaintiff, the defendants say, that †the plaintiff ought not to maintain his aforesaid action thereof against them, because they, the defendants, say, that it was not any part of their duty, as such carriers, to provide, nor did they ever promise to provide, a fit or proper cask or hogshead wherein to carry and keep the said oil upon the said journey from London to Northampton aforesaid, and deliver the same there for the plaintiff; and they further say, that the said cask or hogshead wherein the said oil was contained was, when delivered with the said oil therein to the defendants, as such carriers as aforesaid, and from thence until and at the time of the loss after mentioned, a bad and insufficient cask, and not properly secured and coopered in that behalf without any default on the part of the defendants, or either of them, for which reason, and not otherwise, the said cask or hogshead afterwards, and after the defendants had conveyed the same to Northampton aforesaid, and before the defendants could safely and securely deliver the said oil there for the plaintiff as aforesaid, to wit, on the day and year in the declaration mentioned, broke, burst and gave way, and the said oil therein then escaped from the said cask or hogshead and became and was wholly wasted and lost without the defendants' default; and by reason thereof they were hindered and prevented from safely and securely delivering the said hogshead of oil for the plaintiff according to their said duty as they otherwise might and would have done; and this the defendants are ready to verify, &c.

### 3. *Replication to a Plea of the Carrier's Act, that Plaintiff was guilty of gross Neglect.* (*n*)

And as to the said [second] plea the plaintiff saith, that the defendant

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Tyr. & Gr. 553, S. C. What is a sufficient delivery, or is a receiving house of a carrier; Syms *v.* Chaplin, 1 N. & P. 129; *ante*, 95, and notes. The above plea puts the plaintiff on proof of a delivery to the carrier or his servant for the purpose alleged.

(*m*) This admits that the defendant did not *safely or securely* deliver the goods, and excuses the non-delivery by reason of the consignor's neglect, and would seem therefore to be a good plea in confession and avoidance. The replication might be *de injuriâ*.

(*n*) See forms and observations, *ante*, 284, 285, and *supra*, note (*k*). The act is cited, *ante*, 94, note (*p*). In Boyce *v.* Chapman, 2 Bing. N. C. 222; 2 Scott,

did not nor would take due, ordinary or reasonable care of the said parcel and its contents aforesaid, whilst he had the same in his charge as such carrier as aforesaid, and that the said loss thereof arose from the neglect and omission of the defendant to take such due, ordinary and reasonable care of the said parcel and its said contents, and by reason of the defendant's gross negligence and improper conduct in that behalf; and this the plaintiff is ready to verify.

## †COMMON OF PASTURE. (*o*)

### *Denial of the Plaintiff's Right of Common.* (*p*)

And for a further plea in this behalf, the defendant saith, that the plaintiff *by reason of the possession* of his said messuage and lands ought not at the said times, when, &c. or either of them of right to have had, nor ought he still of right to have common of pasture for his commonable cattle, levant and couchant, in and upon his said messuage and land with the appurtenants in the said places in the said declaration mentioned (*q*); and whereon the said supposed grievances are alleged to have been committed, or either of them, or any part thereof, every year and at all times of the year, as to the said messuage and land with the appurtenants, in the declaration first mentioned, belonging and appertaining, in manner and form as the plaintiff hath above alleged; and of this the defendant puts himself upon the country, &c.

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465; 1 Hodg. 338, S. C.; the plaintiff replied the felony of defendant's porter in the form suggested, *ante*, 285. In Syms *v.* Chaplin, 1 N. & P. 129, where one question was, whether an inn was under circumstances a receiving house within the Carriers' Act, the plaintiff replied *de injuriâ;* and such replication will suffice where the plaintiff denies any of the facts stated in the plea, and which constitutes the defence as matter *in excuse* under the Carriers' Act. See *infra*, "*De Injuriâ.*"

(*o*) See *declaration* and notes, *ante*, 509. The plea of *not guilty* would dispute the mere *fact* of *obstruction*, *ante*, 615, 616; and not deny the plaintiff's possession of the tenements in respect of which he claims common of pasture (see Form 1, *ante*, 520,) or the existence or validity of such claim. The prescription statute, 2 & 3 W. 4 (*ante*, 509, note (*p*)), which sanctions the general form of alleging a right of common, in case for disturbing it, provides that "if the general allegation be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to *sustain* or *rebut* such allegation." Where the obstruction in fact is admitted, but *justified* or excused on account of a license, &c. there must be a special plea accordingly. As to encroachments on a common by license, see Doe *v.* Wilson, 11 East, 56; Harvey *v.* Reynolds, 12 Price, 724; 1 C. & P. 141; Doe *v.* Wilkinson, 3 B. & C. 413; 5 D. & R. 273; Doe *v.* Clark, 8 B. & C. 717. In some cases a plea of license to obstruct, see *post*, "License," may be judicious. Plea, that defendant had a right of common, justifying under it; see 1 Chit. Pl. 6th ed. 498; and *post*, "Trespass," Pleas, "Common," for form of plea.

(*p*) *Supra*, note (*o*).

(*q*) Of course the traverse will be in the words of the declaration, negativing the allegation therein.

## COPYRIGHT. (r)

### *Plea, denying the Copyright.*

And for a further plea in this behalf the defendant says, that the plaintiff was not at the said times when, &c. or either of them, the [author or] proprietor of the copyright of and in the said book in the said declaration mentioned, or any part thereof, as in the said declaration alleged; and of this the defendant puts himself upon the country, &c.

## †CRIMINAL CONVERSATION.

See "Husband and Wife."

## DECEIT.

See "Fraud."

## DE INJURIA REPLICATION. (s)

And as to the said [second] plea, the plaintiff saith, that the defendant at the said time when, &c. of his own wrong and without the cause by him in his said [second] plea alleged, committed the said several grievances in the declaration mentioned, in manner and form as the plaintiff hath above thereof complained against him; and this the plaintiff prays may be inquired of by the country, &c.

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(r) Forms of declarations, &c., *ante*, 512. The plea of not guilty would deny only the mere fact of the *infringement* of the copyright. Plea to declaration for pirating a print, that the date of the first publication was not engraved thereon; Brookes *v.* Cock, 3 Ad. & E. 138; 1 Harr. & W. 129; see *post*, tit. "Patents." The assignment of a copyright must be in writing; see Barnett *v.* Glossop, 1 Bing. N. C. 633; 1 Hodg. 94, where in assumpsit for the price of a copyright, it was held, that the defence of want of writing must be specially pleaded.

(s) This general replication or form of traverse is applicable in *case*, where the plea comprises matter of *excuse*; see 1 Chit. Pl. 6th ed. 605, 590. Instance, *ante*, 623, note (*n*); and *post*, tit. "Libel." See *in general post*, "Trespass—Pleas, &c. *De Injuriâ*."

## DISTRESSES. (*t*)

### 1. *Plea to a Declaration for an Irregularity in a Distress, denial of the Tenancy.* (*u*)

And for a further plea in this behalf, the defendant saith, that the plaintiff did not before or at the time of the making the said supposed distress in the declaration mentioned, hold or enjoy the said messuage and premises, or any part thereof as tenant thereof to the said —— in manner and form as the plaintiff hath above alleged; and of this the defendant puts himself upon the country, &c.

### 2. *Plea to a Count for Distraining for more Rent than was due.* (*x*)

### 3. *Plea to a Count for Selling under a Distress, without having the Goods appraised by two Appraisers, that the Distress was for less Rent than 20l.* (*y*)

And for a further plea as to the said —— count, the defendant saith, that the said distress in that count mentioned was made, and the said

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(*t*) By 11 Geo. 2, c. 19, s. 21, in all actions of trespass or upon the *case* to be brought against any person entitled to rents or services of any kind, or his bailiff or receiver or other person, relating to any entry by virtue of that act or otherwise, upon the premises chargeable with such rents or services, *or to any distress or seizure, sale or disposal of any goods thereupon*, it shall be lawful for the defendant in such actions to plead the *general issue* and give the special matter in evidence. This does not extend to a distress made *off* the premises upon goods fraudulently removed; Vaughan *v.* Davis, 1 Esp. R. 257; Furneux *v.* Fotherley, 4 Camp. 136; Postman *v.* Harrell, 6 C. & P. 225. But it appears to render the plea of not guilty sufficient in actions on the case for irregularities or excesses committed in making or conducting a distress or sale of goods seized upon the premises demised; and the New Rules do not deprive a party of the right to plead the general issue when given by statute. It has however been usual to plead some of the pleas in the text, in these cases. The statement of the tenancy, in an action on the case for an irregular distress, may be considered matter of inducement; and if the New Rules regulated the mode of pleading, the plea of not guilty would not put in issue the tenancy alleged. Where there is a count in trover, upon which the validity of the distress *ab initio* is disputed, the plea of not guilty will clearly be sufficient by virtue of 11 Geo. 2, but a special plea may sometimes be judicious; see *post*, "*Trespass*—Pleas in—Distresses." The defendant will not be allowed to plead to a count in trover, not guilty and also a justification under a right of distress; see Neale *v.* M'Kenzie, 1 C. M. & R. 61. It will be proper to pay money into Court upon any count or part of a count for an excess or irregularity really committed.

(*u*) See *ante*, 513, note (*a*). As to the effect of not guilty, see *supra*, note (*t*).

(*x*) It seems that in Gambrell *v.* Earl of Falmouth, 4 Ad. & E. 73, the defendant specially pleaded "that the whole rent distrained for (not stating for what time) was due and in arrear," concluding to the country; but *semble*, that the plea of *not guilty* would put that question in issue, for the charge that the full amount distrained for was not due, is the very gist of the action, and the only grievances complained of. See further 11 G. 2, c. 19, s. 21, *ante*, 625, note (*t*), as to the effect of the plea of not guilty.

(*y*) See *ante*, 518, Form 6, *id.* note (*j*).

goods and chattels therein also mentioned were sold, for arrears of rent not amounting to 20*l.*, to wit, 15*l.*; and that before the said goods and chattels were sold as aforesaid, to wit, on [*&c.*] they were duly appraised by one sworn appraiser, to wit, one E. F.; and this the defendant is ready to verify, &c.

### 4. *Plea by Landlord sued for not giving Copy of Charges, that he did not personally interfere, and that they were the Charges of the Broker.* (*z*)

And for a further plea to the said —— count, the said defendant C. D. saith, that the said distress in the said —— count mentioned, was made by the direction of him, the said C. D. as the landlord of the said tenements, and not personally by him, but by the said defendant E. F. being a broker and the broker of the said C. D. in that behalf, and who, as such broker made and conducted such distress for the said C. D.; and that he, the said C. D. did not otherwise make or interfere in the said distress or the conduct thereof, and that the said charges and costs in the said —— count mentioned were the charges and costs of the said E. F.; and this the said C. D. is ready to verify.

### 5. *Plea to a Declaration for not leaving the Overplus with the Sheriff; that there was no Overplus.* (*a*)

And for a further plea to the said —— count, the defendant saith, that the produce of the said sale of the said goods and chattels under the said distress in the said —— count mentioned, was not more than sufficient to satisfy the said arrears of rent for which such distress was made, and the reasonable charges of the said distress and appraisement and sale; and of this the defendant puts himself upon the country, &c.

### 6. *Plea of Tender of Amends to a Declaration for an irregular Distress.* (*b*)

And for a further plea the defendant saith, that after the committing of the said supposed grievances in the said declaration mentioned, and be-

(*z*) See *ante*, 521, Form 9, and *id.* note (*m*); Hart *v.* Leach, 1 M. & W. 560.

(*a*) See form of declaration, &c. *ante*, 521, Form 10, and note thereto. See Plea, Lyon *v.* Tompkins, 1 M. & W. 703, cited *id.* If the overplus were paid to the plaintiff, plead accord and satisfaction; see *id.*; and *ante*, 619. *Not guilty* would suffice to enable the defendant to prove that he had paid the overplus according to the statute before action, or he might plead that before the commencement of this suit, to wit, on &c. he paid to ——, being sheriff, &c. a certain sum, to wit, &c. being the overplus of, &c. concluding to the country. If there were an overplus not paid before action, it should be paid into Court.

(*b*) By 11 G. 2, c. 19, s. 20, the tenant shall not recover in case for an irregular distress, where there was a right to distrain, if tender of sufficient amends have

fore the commencement of this suit, to wit, on [*&c.*] the defendant tendered and offered to pay to the plaintiff the sum of £—— in full satisfaction of, and as and for amends for the said supposed grievances, the said sum then being sufficient amends to the plaintiff for the said supposed grievances, to accept and receive which said sum of money the plaintiff then wholly neglected and refused, and still doth neglect and refuse; and this the defendant is ready to verify, &c.

## DOGS.

See "Mischievous Animals."

## EASEMENTS

[See *ante*, 526, tit. "Easements." The plea of not guilty would not dispute the plaintiff's title or right to the easement, and would put in issue the mere fact of obstruction; see "Ancient Lights," *ante*, 497; "Common," *ante*, 509; and "Ways," "Watercourses," *infra*.]

## ESCAPES. *(c)*

1. *Plea to an Action against the Sheriff for an Escape, or for not taking a Person on Mesne Process, that he was not indebted to Plaintiff.* (*d*

And for a further plea in this behalf the defendant saith, that the said †E. F. was not before or at the time of the issuing of the said writ of ca-

been made before action brought. In Williams *v.* Price, 3 B. & Ad. 695, where in trespass the defendant pleaded that he tendered a certain sum, being a sufficient amends, it was held that the plaintiff should reply that the defendant did not tender the sum named, or that the sum was sufficient, and not that he did not tender sufficient amends; and see per Tindal, C. J. Markes *v.* Lahee, 3 Bing. N. C. 418; 4 Scott, 137, S. C. See plea, *post*, "Tender," and note there, as to paying money into Court

(*c*) Forms of declarations, *ante*, 526, 527, tit. "Escapes." "In actions for an *escape* it (*the plea of not guilty in case*,) will operate as a denial of the *neglect* or *default* of the sheriff, or his officers, but not of the debt, judgment, *or preliminary proceedings*," New Rules, *ante*, 614. Therefore there must be a special plea denying the allegation of the debt stated to be due from the defendant in the original action; or of the writ alleged to have been issued; or of the judgment stated to have been obtained; where any such matter of inducement is meant to be put in issue. See Forms *infra*, and 3 Chit. Pl. 843 to 848. A plea of recaption must be special, see 8 & 9 W. 3, c. 27, s. 6.

(*d*) See Baker *v.* Fenn, 2 Esp. R. 476; Alexander *v.* Macauley, 4 T. R. 611; Bull.

pias in the said declaration mentioned, indebted to the plaintiff in the said sum, of £——, or any part thereof in manner and form as the plaintiff hath above alleged; and of this the defendant puts himself upon the country, &c.

## 2. *Pleas in Case for an Escape on Mesne Process,*—1, *Denial of the Writ—and* 2, *Of the Arrest.*

[See *ante*, 627, note (*c*). A plea denying the issuing of the *writ* may be "that no such writ of capias as in the said declaration mentioned, directed to the said sheriff of ——, was sued or prosecuted by or at the suit of the plaintiff, out of the said Court, against the said ——, in manner and form as in the declaration alleged, and of this the defendant puts himself upon the country, &c." Where an *escape* from the sheriff's custody is charged, the plea of not guilty would deny the escape; but *qu.* whether it also puts the plaintiff on proof that the party was arrested, or in the sheriff's custody, upon the writ? It is difficult to understand how the plaintiff can establish a "neglect or default" on the part of the sheriff, without showing the arrest or detention upon his, the plaintiff's, writ before or at the time the debtor is shown to have escaped from the sheriff. The *arrest* might be traversed thus:—"and for a further plea the defendant says that he did not take or arrest the said E. F. by his body, or have or detain him in his custody by virtue of the said writ in the declaration mentioned," *modo* &c. concluding to the country. In Guest *v.* Elwes, 5 Ad. & E. 118, in case for an *escape* on a *ca. sa.* the sheriff pleaded,—1, not guilty:—2, *that he did not arrest.* The proof was of a negligent *omission* to arrest. The judge would not amend under 3 & 4 W. 4, c. 42, s. 23, but allowed the plaintiff to go into a case of *omission* to arrest, on which he succeeded; and the Court held the variance immaterial, and permitted the verdict on the special finding to stand; giving defendant his costs of the issue on which he nominally succeeded. See special form of postea, *id.*]

## †3. *Pleas to a Count against a Sheriff for not taking the Defendant on Process when he had an opportunity.*

[The plea of *not guilty* would admit the *debt* and the *writ.* It would merely deny the *gravamen*, viz. the not taking the debtor when the sheriff had an opportunity, which constitutes the neglect or breach of duty; but would appear necessarily to involve the question whether the defendant

N. P. 66; 2 Stark. Ev. 2d ed. 740, 741; White *v.* Jones, 5 Esp. R. 162; Barker *v.* Green, 2 Bing 317. The admission of the debt by the defendant in the original action before the escape, is good evidence against the sheriff; Rogers *v.* Jones, 7 B. & C. 86; 9 D. & R. 878; Williams *v.* Bridges, 2 Stark. R. 42. The same evidence which would fix the debtor in an action against him for the debt, will be sufficient against the sheriff; Sloman *v.* Herne, 2 Esp. R. 695; Gibbon *v.* Coggon, 2 Camp. 188.

had the opportunity of arresting the debtor, and to put the plaintiff on proof of such opportunity, as also that the sheriff had notice, but neglected to avail himself thereof. It seems, however, that in Brown *v.* Jarvis, 1 M. & W. 705, the sheriff pleaded that "he did from the time of the delivery of the said writ to him, use all the diligence in his power to take the said ——, as by the said writ he was commanded."

In Brown *v.* Jarvis it was doubted by the Court whether in case for not taking a defendant, proof of special damage was not necessary: Lord Abinger, C. B. in delivering judgment said, "but the defendant, by not pleading the general issue to the declaration, must now be considered as having admitted the allegations in it: and there it is stated that the defendant neglected to take the defendant in the cause on the writ of capias when he might, and that in consequence of his not being taken he afterwards died. However improbable that may be, it must be taken for granted to be true;" and, therefore, "the judgment could not be arrested on that point," see also *id.* 711. Assuming that special damage were necessary, *qu.* whether it is clear that *not guilty* would put it in issue? and if this be doubtful, it would be judicious to plead, "that the plaintiff was not in any manner damnified or injured by reason of the sheriff's default," &c., *modo*, &c.]

### 4. *Plea to Case against the Sheriff for an Escape, that he took a Bail Bond, which he assigned to the Plaintiff.* (e)

1st. Not guilty. And for a further plea in this behalf the defendant says, that after the said E. F. in the said declaration named, had been taken and arrested by the defendant; and whilst he was detained in the custody of the defendant at the suit of the plaintiff, under and by virtue of the said writ of capias, and for the cause in the said declaration respectively mentioned, and before the expiration of eight days after the said arrest, and before the said writ was returned, to wit, on [*&c.*] he, the defendant, according to the form of the statute in such case made and provided, took bail for the appearance of the said E. F. by his causing special bail to be put in for him, the said E. F. in her majesty's Court of Common Pleas to the said action, at the suit of the plaintiff, within the time in that behalf specified in the said writ, and as he the said E. F. was required by the said writ, †and on that occasion the said E. F., and certain persons, to wit, G. H. and I. J. as bail or sureties for the said E. F. then, to wit, on the day and year last aforesaid, by their certain writing obligatory, commonly called a bail bond, sealed with the seals of them the said E. F. [*&c.*], (and which said writing obligatory being in the possession of the plaintiff, the defendant cannot produce the same to the Court here) acknowledged themselves to be held and firmly bound

(e) See Holden *v.* Raphael, 4 Ad. & E. 228; Mendez *v.* Bridges, 5 Taunt. 325.

to the defendant, then being sheriff of the county of —— aforesaid, as such sheriff, by the name, description, and addition of [*&c.*] sheriff of the county of ——, in the penal sum of £——, to be paid to the said sheriff, or his certain attorney, [*&c.*], with or under a certain condition thereunder written, that if the said E. F. did cause special bail to be put in for him to the said action in her majesty's said Court as required by the said writ, then that obligation should be void, and of no force, otherwise should stand and remain in full force, vigor, and effect as by the said writing obligatory and the condition thereof, reference being thereunto had, will appear. And the defendant says that the said E. F. did not cause special bail to be put in for him to the said action in her majesty's said Court as required by the said writ, but therein made default, whereby the said writing obligatory became and was forfeited. And the defendant further says, that the said writing obligatory being so forfeited, and the money therein specified remaining unsatisfied to the said sheriff, the defendant, so being sheriff as aforesaid, afterwards, to wit, on [*&c.*] at the request of the plaintiff, by an indorsement on the said writing obligatory, duly assigned the said writing obligatory to the plaintiff, according to the form of the statute in such case made and provided, and then delivered the said writing obligatory, with the said assignment so thereon indorsed as aforesaid, to the plaintiff, and he took and received the same; and this the defendant is ready to verify, &c.

### 5. *Other Pleas in Case for Escapes.*

[See Forms in *debt*, 3 Chit Pl. 843 to 848; Petersd. 193. Plea that the escape was by the fraud, &c. of the assignee of the judgment; Hiscocks *v.* Jones, 1 M. & Mal. 260.]

## FAIRS.

See "Markets."

## FALSE REPRESENTATION.

See "Fraud."

## †FERRIES—FISHERIES.

[See those titles, *ante*, 527, 528. The plea of not guilty would deny the mere *fact* of *disturbance* of the right of ferry or fishery. If the de-

fendant deny the plaintiff's *title*, he should specially traverse the claim as alleged in the declaration, concluding to the country; see *ante*, 614, 624.]

## FIXTURES.

See "Landlord," "Reversion."

## FRAUD. (*f*)

### 1. *General Observations on, and usual Forms of, Pleas in Actions for Fraud.*

[In Spencer *v.* Dawson, 1 Moo. & Rob. 552, which was an action on the case for deceit in the warranty of a horse, Parke, B. held, "that under the New Rules the plea of *not guilty* put in issue both the *warranty* and the *unsoundness*, in short the whole declaration, *except the bargain and sale*, which were matter of inducement:" see also Mash *v.* Densham, *id.* 442, where, *the plea being not guilty*, an amendment of the allegation in the declaration, in regard to the terms of the misrepresentation of *unsoundness* of a horse, was prayed and granted at the trial. In cases where a *fraudulent* and wilful misrepresentation, in other words the *scienter*, is the *gist* of the action, (when not, see *ante*, 528, note (*p*),) there can be no doubt the *scienter* would be put in issue by the plea of not guilty; see Thomas *v.* Morgan, 2 C. M. & R. 496; 4 Dowl. P. C. 223, S. C. It has however not been unusual in practice, in case for a fraudulent warranty, &c. to traverse the *scienter* (when material) in express terms in a plea, and in another plea to deny in terms the warranty or falsity of the representation stated to have been made, besides pleading not guilty. *Thus, in one case (see form of declaration, ante, 529,) the judge allowed the following pleas to be pleaded:—*

1st. Not guilty;—2dly. And for a further plea in this behalf, the defendant saith that he did not at or before the time of the said supposed sale to the plaintiff of the said horse, *know* that the said horse had contracted the said supposed malady or unsoundness in the said declaration mentioned, in †manner and form as the plaintiff hath above alleged; and of this the defendant puts himself upon the country, &c.;—3dly. And for a further plea in this behalf, the defendant saith that at the time of the said supposed sale, the said horse was not unsound and had not con-

(*f*) See declarations, *ante*, 528 to 539.

tracted the said supposed malady, and was not glandered as in the declaration alleged; and of this the defendant puts himself upon the country, &c.

*In another case the following pleas* (though opposed upon a summons to plead several matters,) *were allowed by the judge*, the declaration being for a fraudulent misrepresentation of the business of a public-house:—1st. Not guilty;—2dly. And for a further plea in this behalf, as to so much of the said declaration as relates to the supposed causing and inducing the plaintiff to agree to accept such lease from the defendant to the plaintiff as in the declaration mentioned, and to execute a counterpart thereof, and the supposed selling and inducing the plaintiff to buy the said good will, and also the said fixtures, effects and stock in trade as in the declaration also mentioned, the defendant says, that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that he the defendant did not by falsely, fraudulently or deceitfully pretending or representing to the plaintiff, and inducing him the plaintiff to believe and suppose that the said supposed false, fraudulent and deceitful representations of the defendant were true, or by fraud or covin in that behalf, cause or induce the plaintiff to agree to accept such lease of the said tenements from the defendant to the plaintiff as in the declaration mentioned, or to execute a counterpart thereof, or sell or induce the plaintiff to buy the said good will, or the said fixtures, effects, or stock in trade in manner and form as the plaintiff hath above thereof in his said declaration in that behalf complained against him the defendant; and of this the defendant also puts himself upon the country;—3dly. And for a further plea in this behalf, the defendant says that the said trades and businesses of the said public house and premises had not been nor were less extensive or valuable than the defendant is by the said declaration above supposed to have represented in manner and form as the plaintiff hath above complained; and of this the defendant also puts himself upon the country, &c.

*In another case, which occurred in the course of the Author's practice, the following pleas were allowed, in Case for a misrepresentation in regard to a picture*, (*see ante*, 530, Form 3);—1st. Not guilty;—2dly. And for a further plea in this behalf, the defendant saith that although he did sell to the plaintiff the said picture in the declaration mentioned, yet that he did not sell the same as or for a picture painted by the said master in painting; and of this the defendant puts himself upon the country, &c.

†In Lyde *v.* Barnard, 1 M. & W. 101; 1 Tyr. & G. 250, S. C., which was case for a false representation as to the interest of a third person in certain property, the pleas were, 1st. Not guilty;—2dly. That the plaintiff was not by the representation induced to advance, nor did he advance

in consequence thereof, the money mentioned in the declaration, &c., *modo*, &c. Again, in Langridge *v.* Levy, 2 M. & W. 519, which was an action for a false warranty of a gun, upon the sale thereof to a third person, and which injured the plaintiff, the pleas were, 1st. Not guilty;—2dly. That defendant did not warrant the said gun to be made by Nock, and to be good, &c.;—3dly. That the gun was not bad, dangerous and ill-made, &c.;—4thly. That the gun did not, by reason and wholly in consequence of the weak, &c., make, materials, &c., burst, &c., as alleged.

*It is considered that not guilty only would have been sufficient in these instances;* but the Forms are given, to be used at the discretion of the practitioner. See *ante*, 614, as to the general principles regulating the plea of not guilty in case.]

### 2. *Pleas in Case for falsely representing a Third Person to be Trustworthy.*

[In general the plea of not guilty would be sufficient; see *ante*, 631: and Lyde *v.* Barnard, 1 M. & W. 101; 1 Tyr. & G. 250, S. C., cited *ante*, 537, note. The defendant might plead *specially* that the representation was not in writing and signed by defendant, according to 9 G. 4, c. 14, s. 6; if the declaration does not charge it was in writing and signed, in which case not guilty would certainly be sufficient to put that question in issue. The plea might be thus:—"that the said representation or assurance in the said declaration mentioned to have been made by the defendant concerning or relating to the [*credit* and *ability*] of the said ——, was and is a representation or assurance within the true intent and meaning of a certain act of parliament passed in the ninth year of the reign of his late majesty, King George the Fourth, intituled "An Act for rendering a Written Memorandum necessary to the validity of certain Promises and Engagements;" and that the said representation or assurance of the defendant was not, nor was any part thereof, in writing signed by the defendant, according to the said statutes; and this the defendant is ready to verify.]

### 3. *Plea denying the Bargain and Sale in Case for a false Warranty or fraudulent Misstatement.* (*g*)

And for a further plea in this behalf, the defendant saith that the plaintiff did not bargain with the defendant to buy of him, nor did the plaintiff buy of the defendant the said —— in the declaration mentioned, in manner and †form as the plaintiff hath above alleged; and of this the defendant puts himself upon the country, &c.

(*g*) See *supra*, 631.

GENERAL ISSUE. *See* "NOT GUILTY," *ante*, 614.

GOODS. *See* "REVERSION."

HIRER. *See* "BAILEES."

HOUSES. *See* "NUISANCES," "REVERSION."

## HUNDRED. (*k*)

### *Pleas in an Action against the Hundred for Damage done by Rioters.*

#### 1. *Denial of the Riot and Demolition.*

And the defendant, by —— his attorney, says that the said supposed persons, to the number of three and more, did not nor did any of them with force and arms riotously and tumultuously assemble together to the disturbance of the public peace, and did not unlawfully and with force feloniously begin to demolish or destroy, or then unlawfully, or with force and arms feloniously demolish, pull down, or destroy in part the said house of the plaintiff, against the peace of our said lady the queen, and against the form of the statute in such case made and provided, nor did such persons or any of them unlawfully and with force at the same time, damage or destroy the said fixtures, furniture and goods of the plaintiff or any part thereof as in the declaration alleged; and of this the defendant puts himself upon the country, &c.

#### 2. *That the Plaintiff was not examined before a Justice.*

And for a further plea in this behalf, the defendant says that the plaintiff did not within seven days next after the commission of the said supposed offence in the declaration mentioned, in pursuance of the statute in such case made and provided, go before the said J. O., Esquire, and submit himself to the examination of the said justice touching the circumstances of the said supposed offence as in the declaration alleged; and of this the defendant puts himself upon the country, &c.

(*k*) Declaration, &c., *ante*, 540.

†3. *That the Plaintiff knew one of the Offenders.*

And for a further plea in this behalf, the defendant says that the plaintiff, at the time of his submitting to such examination as aforesaid, and within seven days next after the commission of the said supposed offence, did know the name of one of the offenders who was guilty of the said supposed offence, to wit, W. C.; yet the plaintiff did not, within seven days next after the commission of the said supposed offence, state upon oath before such justice the name of the said W. C. as one of the said offenders, and as a person whom he the plaintiff knew to be one of such offenders as aforesaid, nor was the plaintiff bound by recognizance to prosecute, nor hath he prosecuted the said W. C. for the said offence or attempted so to do as he the plaintiff might and ought to have done; and this the defendant is ready to verify, &c.

4. *That the Plaintiff was not bound by Recognizance to prosecute.*

And for a further plea in this behalf, the defendant says that the plaintiff did not, within seven days next after the commission of the said supposed offence, in pursuance of the said statute, duly enter into or become bound by recognizance before the said J. O. to prosecute for the said offence the said offenders when apprehended, as in the declaration alleged; and of this the defendant puts himself upon the country, &c.

5. *That the Damages do not exceed* 30*l.*

And for a further plea in this behalf, the defendant says that the damages by the plaintiff alleged to have been sustained by reason of the said supposed offences in the said declaration mentioned, do not exceed the sum of £30; and this the defendant is ready to verify, &c.

## HUSBAND AND WIFE.

[See declaration and note, *ante*, 540. In Holloway *v.* Abell, 7 C. & P. 528, *Littledale*, J. (Tidd, N. P. Addenda, 650,) held, that in case for the *seduction* of the plaintiff's daughter, the defendant might show, under the plea of not guilty, that the daughter was not the *servant* of the plaintiff; and that such matter, being the gist of the action need not be specially pleaded. The principle of this decision leads to the conclusion, that in an action for *criminal conversation*, not guilty puts the plaintiff on proof of his marriage. See further, *ante*, 617. In some cases of this kind, pleas of not guilty, and of a denial of the marriage, have been al-

lowed by the judges upon summonses to plead several matters. The plea might be thus: "That †the said —— was not at either of the said times when, &c. the wife of the plaintiff as in the said declaration alleged; and of this the defendant puts himself upon the country, &c." A marriage in fact must be proved; 2 Stark. Ev. 2d ed. 251, tit. "Crim. Con." If the defence be that the plaintiff connived at and consented to the intercourse, plead leave and license as *post*, "License;" see Hodges *v.* Windham, Peak. R. 39; Duberley *v.* Gunning, 4 T. R. 655. Under not guilty, evidence in mitigation of damages may be received; see 2 Stark. Ev. 254, tit. "Crim. Con." 2d edit.

## INFANCY.

[Where an infant is sued in *Case* for neglect as a bailee, under a contract of bailment upon which he is not liable, his infancy affords him a defence; see Jennings *v.* Randall, 8 T. R. 330. This defence should be pleaded specially. The plea would be as in *assumpsit*, *ante*, 314, Form 1, stating that defendant was an infant "at the time of ["hiring the said horse," *as the case might be*,] and committing the supposed grievances in the declaration mentioned," &c.

## INNKEEPERS. (*i*)

### *Plea, that Plaintiff did not bring the Goods into Defendant's Inn.*

And for a further plea the defendant says, that the plaintiff did not, as such traveller as aforesaid, bring into the said inn the said writing case or package containing the said goods and chattels and effects, or any or either of them, or any part thereof, in manner and form as the plaintiff hath above alleged; and of this the defendant puts himself upon the country, &c.

## INVENTION. *See* "COPYRIGHT," "FRAUD," "PATENT."

(*i*) Not guilty would deny the breach of duty or wrongful act only. That plaintiff brought goods into the inn, would seem to be matter of inducement, and should be specially denied if untrue. Pleas, that the loss arose from the plaintiff's neglect, &c.; 3 Chit. Pl. 6th ed. 928, 929. Declarations, &c. *ante*, 541.

JUDGMENT RECOVERED.

See observations and forms in *assumpsit*, *ante*, 334 to 336; in *case*, The Right Honorable Sir L. Shadwell *v.* Hutchinson, 2 B. & Ad. 97.

†LANDLORD AND TENANT. (*k*) *See* "DISTRESSES," "REVERSION."

1. *To Case by a Landlord against a Stranger, for an Injury to his Reversion, Plea denying the reversionary interest.*

And for a further plea in this behalf, the defendant says, that the said [messuage] was not, nor was any part thereof, in the possession or occupation of the said E. F. as tenant thereof to the plaintiff, (*l*) nor did the reversion thereof, or of any part thereof, belong to the plaintiff at either of the said times when, &c. as in the said declaration alleged; and of this the defendant puts himself upon the country, &c.

2. *In Case by a Landlord against his Tenant for Waste, &c., Plea denying the Tenancy.*

And for a further plea in this behalf, the defendant says, that he did not hold or enjoy the said [messuage and premises] with the appurtenants, or any part of the same, as tenant thereof to the plaintiff, as in the said declaration alleged; and of this the defendant puts himself upon the country, &c.

3. *Plea, in Case by a Landlord for injuring a House, and Removing fixtures, that they were put up by the Tenant for the purposes of his Trade.* (*m*)

And for a further plea as to the pulling down, prostrating, and de-

(*k*) Declarations, &c. *ante*, 541 to 544. In an action on the case by a landlord for an injury to his reversion, the plea of not guilty would not deny, and would therefore admit, the tenancy laid in the declaration and the allegation (see Form 1, *ante*, 541) that the reversion belonged to the plaintiff. These are matters of *inducement*, requiring, if contested, a special plea. *Not guilty* denies the acts of injury, waste or nuisance, &c. charged, and also the allegation that the acts complained of occasioned an injury to the reversionary interest.

(*l*) If there be a written demise it must be produced and proved, it seems, by the plaintiff; see Cotterill *v.* Hobby, 4 B. & C. 465; 6 D. & R. 551; Strother *v.* Barr, 5 Bing. 136.

(*m*) See as to fixtures, Amos on Fixtures; Chit. jun. Contr. 2d edit. 280 to 291; Wansborough *v.* Maton, 4 Ad. & E. 884. See form of plea that an alleged fixture was put up by screws and for ornament only, and was, therefore, removed, and replication, &c. Avery *v.* Cheslyn, 3 Ad. & E. 75. Where there is a count in trover plead not guilty; and that the plaintiff was not lawfully possessed as of his own property, &c. in order to try the right to the fixtures.

stroying the said oven in the said declaration mentioned, and pulling down, prostrating, damaging, and destroying a small part of the said walls, partitions and other parts of the said messuage, the defendant saith, that [*actio non*, because he saith that] he the said W. H. before and at the said times, when &c., was lawfully possessed of the said messuage, and long before and at the said several times, when &c., had used, exercised, and carried on in and upon the said messuage the trade and business of a baker, the said messuage, with the appurtenants, having before that time, to wit, on [*&c.*] been let and demised to him, to wit, by the plaintiff, for the purpose of his using, exercising, and carrying on his said trade and business therein as aforesaid; and that he the said W. H., in the course of his said trade and business, and for the purpose of carrying on the same in and upon the said messuage as aforesaid, during the said tenancy, before the said times, when &c., to wit, on [*&c.*] set up and erected in and upon the same the said oven in the declaration mentioned, in a due, careful, usual, and proper manner, [and in such a manner that the same could be removed without doing extensive or substantial damage to the said messuage,] doing as little damage as possible to the said messuage upon that occasion. And the defendant further saith, that the said W. H. being so possessed of the said messuage, and so using, exercising, and carrying on his said trade and business therein; he the defendant, during the said tenancy, to wit, at the said times, when &c., as the servant of the said W. H. and by his command, did pull down the said oven, and in so doing did necessarily and unavoidably a little pull down, prostrate, damage, and destroy a little of the said walls, partitions, and other parts of the said messuage as the defendant lawfully might for the cause aforesaid, doing no unnecessary damage to the said messuage on those occasions, which are the same supposed grievances in the introductory part of the plea mentioned; and whereof the plaintiff hath above thereof complained against the defendant, [and the defendant as the servant and by the command of the said W. H. during the said tenancy, to wit, on [*&c.*], at the expense of the said W. H. repaired all damage which had arisen from the said erection and pulling down of the said oven;] and this the defendant is ready to verify; wherefore, &c.

### 4. *Replication thereto, that the Terms of the Demise forbid the Removal.*

And as to the plea of the defendant by him secondly above pleaded as to the said several grievances in the introductory part of that plea mentioned, the plaintiff saith, that [*precludi non*, because he saith that] before and at the said times, when &c., the said W. H. held and enjoyed and was possessed of the said messuage, with the appurtenants, as tenant thereof to the plaintiff, (the reversion thereof so belonging to him,) under and by virtue of a certain indenture of lease, heretofore, to wit, on [*&c.*]

made between the plaintiff, of the one part, and the said W. H. of the other part, and which indenture, sealed with the seal of the said W. H., the plaintiff brings here into Court, whereby the plaintiff demised unto the said W. H. the said messuage, with the appurtenances, for the term of twenty-one years from [*&c.*], and the said W. H. did thereby covenant with the plaintiff that in case the said W. H. should, during the said term, erect an oven on the said premises, the plaintiff should on request find, or allow unto the said †W. H. all the iron work necessary for the same, and on completion of the same in a substantial and proper manner, allow unto him out of the then next quarter's rent thereby reserved, the sum of £5 towards the expenses of erecting the same, and that in case the said W. H. should during the said term erect any building or buildings on the said demised premises, the same should not be afterwards taken down or removed, but be peaceably and quietly given and yielded up to the plaintiff at the said expiration or other sooner determination of the said term, without any allowance being made by the plaintiff for the same; and the plaintiff avers that the said oven in the declaration mentioned, was erected by the said W. H. in and upon the said demised premises and affixed thereto, and became parcel thereof, after the making of the said indenture and during the said term, to wit, on [*&c.*]; and that he the plaintiff did, on request, find and allow unto the said W. H. all the iron work necessary for the same, and the same oven was then completed in a substantial manner, and the plaintiff was ready and willing to allow to the said W. H. out of the then next quarter's rent, the sum of £5 towards the expenses of erecting the same according to the said indenture; and the said oven remained and was erected and stood in and upon the said demised premises, and was affixed as such building as aforesaid to the said premises, until the defendant, at the said times, when &c., of his own wrong committed the said several grievances in the introductory part of the second plea mentioned, and in that plea attempted to be justified; and this the plaintiff is ready to verify; wherefore, &c.

## LEAVE AND LICENSE. *See* "LICENSE."

## LIBEL AND SLANDER. (*n*)

### 1. *Not Guilty.* (*n*)

[See Forms 1, 2, *ante*, 618.]

(*n*) See Forms of declarations, *ante*, 545 to 562; and observe the notes there. "In an action of slander of the plaintiff in his office, profession or trade, the plea of *not guilty* will operate to the same extent precisely *as at present*, in *denial* of speaking the words, of speaking them maliciously and in the *sense imputed, and with refer-*

### †2. *Plea to a Declaration for a Libel on the Plaintiff in his Profession, Trade or Office—traversing the Inducement.* (*o*)

And for a further plea in this behalf, the defendant saith, that the plaintiff was not [" an attorney" *as the case may be*] and did not use, exercise

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*ence* to the plaintiff's office, profession or trade; but it will not operate as a denial of the fact of the plaintiff's *holding the office or being of the profession or trade alleged.*" This is put in the *New Rules* on pleading by way of illustrating the effect of plea of *not guilty* in *case; ante*, 614. The same principle equally applies to an action for *libel.* "This rule appears to leave to the plea of not guilty, in an action of slander, nearly the same effect that it possessed before, with the exception that under the new rule it is an admission of the inducement. In other respects a justification must still be pleaded in cases in which it was formerly necessary to plead it, and the defendant may still under the plea of not guilty give the like evidence as formerly, to show that the words were not spoken in malice, (as that they were spoken by way of good advice, or for the purpose of giving the character of a servant, or with the *bonâ fide* view of procuring information on a particular subject.) In short, not only the *sense* and *application* of the words, as that they related to the plaintiff, but also the *malicious* sense, as that they were spoken in a defamatory spirit, may still be controverted under the general issue. But any facts stated as matter of *inducement* and necessary to be proved in order to render words actionable, as being spoken with reference to those facts, must now be directly denied and will not be put in issue by the general plea of not guilty;" Rosc. Law Tr. 49, 50; Tidd, N. P. 371. See further *id.* 371; 1 Chit. Pl. 6th ed. 492; Rosc. Ev. 4th ed. 375 to 380, for instances of lawful occasions justifying or excusing the slander, and in which *not guilty* is deemed sufficient, the occasion disproving malice. Mr. Starkie observes, that in all cases where the circumstances and occasion of the speaking the words or publishing the libel do not afford an *absolute bar* to the action, without regard to the defendant's motives and intention, but merely throw it on the plaintiff to prove malice *in fact*, the defendant *cannot* plead such occasion or circumstances specially, but *must* plead not guilty; 2 Stark Ev. 2d ed. 468. The *innuendoes*, (see *ante*, 547, n. (*t*),) are clearly traversed by the plea of not guilty, but where an innuendo refers to matters stated by way of inducement, that plea will only put in issue the *application* of the words to the introductory matter, and not the truth of the introductory averments themselves, which is admitted by such plea; Rosc. Law Tr. 50. Under not guilty the jury have to consider the character of the libel, and whether the matter contains the charge imputed by the plaintiff; see Stockdale *v.* Tarte, 4 Ad. & E. 1016; and see per Bosanquet, J., Clarke *v.* Taylor, 3 Bing. N. C. 668; but where the libel or words as laid in the declaration clearly will not support an action, the defendant should *demur*.

The question whether *privileged communication* should be specially pleaded, or rather whether a special plea of such defence amounted to the general issue, arose on special demurrer, but was not decided, in Smith *v.* Thomas, 2 Bing. N. C. 322; 4 Dowl. P. C. 333. In Sir J. Lillie *v.* Price, 1 N. & P. 16; 5 Dowl. 432; which was an action for a libel, the defence was, that the letter containing the supposed libel was a privileged communication from an attorney to one who had recently been his client, to warn him against the plaintiff in a matter then in progress. Lord Denman, C. J. "We have consulted the other judges upon the point raised in this case, viz. whether the defence made by the defendant ought to have been specially pleaded, and we are all of opinion that it is a defence not required to be specially pleaded."

We have already fully considered the meaning and nature of an *inducement* or statement of introductory matter in actions for libel and slander; see *ante*, 549, note (*y*). Whenever the inducement is material, it may and should (if denied) be traversed by a special plea; see Forms *infra*.

Where words, though of a disparaging nature, are not actionable *of themselves*, and will only support an action in consequence of *special damage* having arisen from them; (see *ante*, 561, and note (*b*);) the special damage is the *gist* and ground work of the action, and constitutes part of the wrong committed by the defendant. In such case, the action is for the special damage, rather than for slander; and the mere proof of the words would not establish any fact of a wrongful character. It seems therefore, upon principle, that the plea of not guilty suffices in such case, (and in the analogous action for slander of title; see *ante*, 562, Form 7) to put the plaintiff upon proof of special damage; see *ante*, 616, 617, 629; Tidd N. P. 374; Brown *v.* Jarvis, 1 M. & W. 711, 214;

or †carry on the profession [*or* "trade"] and business of a —— during any part of the time in the said declaration in that behalf mentioned as

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Evans *v.* Lisle, 7 C. & P. 562; Malachi *v.* Soper, 3 Bing. N. C. 371. Where words are actionable without special damage, a plea traversing an allegation of such damage is bad; see Smith *v.* Thomas, 2 Bing. N. C. 372; 1 Hodg. 355; where such a plea was held bad on demurrer. "The allegation of special damage in a declaration of slander is intended only as notice to the defendant, in order to prevent his being taken by surprise at the trial. Where the words are actionable in themselves, it is not the *gist* of the action but a *consequence* only of the right of action. If the plaintiff prove his special damage, he may recover it, if he fail in proving it he may still resort to and recover his general damages. A traverse therefore of such an allegation is immaterial and improper, as a finding upon it either way will have no effect as to the right to the verdict;" per Tindal, C. J. *id.*

Where the defence is, that the libel or slander is *true*, so that the publication is *justified*, and the question of malice forms no part of the inquiry, it is *necessary* to plead specially; see cases Tidd, N. P. 371, 372; 1 Chit. Pl. 6th ed. 494; 1 Stark. Sl. 2d ed. 465. But in case for slander of *title*, evidence of the truth was held (before the New Rules) to be receivable as a defence under the general issue, to disprove malice; *id.*; Watson *v.* Reynolds, 1 Mo. & M. 1.

"Though in an action for slander of the person, the defendant is not allowed to give in evidence the truth of the defamatory matter without a special plea of justification, yet he may prove on the plea of not guilty, in mitigation of damages, such facts and circumstances as show a ground of suspicion, not amounting to actual proof of the guilt of the plaintiff. In an action for a libel, he may give in evidence on the plea of not guilty, in mitigation of damages, that before and at the time of the publication of the libel, the plaintiff was generally suspected to be guilty of the crime imputed to him, and that on account of the suspicion his relations and acquaintance had ceased to associate with him. The defendant may also give in evidence on such plea not only that there were rumors and reports of the same tenor as in the supposed libel, previously current; but that the substance of the libellous matters had been published in a newspaper, and he is not required to lay a basis for this evidence by producing the newspaper at the trial. And though the publication of preliminary or ex parte proceedings containing defamatory matter is not justifiable, yet in an action for a libel, purporting to be a report of a coroner's inquest, evidence of the correctness of the report is admissible under the plea of not guilty in mitigation of damages; but no evidence of the truth or falsehood of the facts stated at the inquest is admissible on either side. So, in an action for a libel, a defendant may give in evidence on the plea of not guilty, in mitigation of damages, other libels published of him by the plaintiff relating to the same subject; but in order to the admission of such libels in evidence, it must be distinctly shown that they relate to the subject of the libel complained of. So, in an action for a libel in a newspaper, the defendant was allowed, under the plea of not guilty, to show, in mitigation of damages, that he copied the statement from another newspaper, but was not allowed to show that it had appeared concurrently in several other newspapers. So the defendant, in such an action, cannot go into evidence in mitigation of damages, to show that the same libel had appeared in another newspaper, from which the plaintiff had already recovered damages; but the defendant may show that he copied the libel from another newspaper and omitted several passages contained in that newspaper, which reflected on the character of the plaintiff. And the defendant cannot, under the plea of not guilty, give evidence of any fact in mitigation of damages which would be evidence to prove a justification of any part of the libel." Tidd, N. P. 371 to 373.

It is no defence that the libel or slander was communicated to the defendant by a third person, whose name as the author the defendant disclosed at the time of publication; see De Crespigny *v.* Wellesley, 2 M. & P. 695; 5 Bing. 592; Macpherson *v.* Daniels, 10 B. & C. 263; 5 M. & R. 251, S. C.; Bennett *v.* Bennett, 6 C. & P. 588; Tidd, N. P. 373, 374; but such matter may be shown under not guilty, in mitigation of damages.

The issue on not guilty, in an action for a libel containing several distinct charges against the plaintiff, is divisible, so that the verdict may be as to part for him, and as to the residue for the defendant; *ante*, 548, note (*t*). Although the plea admit the publication, the plaintiff is at liberty to show the manner of it, with a view to the amount of damages; Vines *v.* Serell, 7 C. & P. 163. As to *costs* in an action for libel or slander, see *ante*, 545, note (*h*).

(*o*) See *ante*, 549, note (*y*), 551, note (*e*), 557, and 558.

therein alleged; and of this the defendant puts himself upon the country, &c.

In Cannell *v.* Curtis, 2 Bing. N. C. 228; 2 Scott, 379; and 1 Hodg. 342, S. C.; which was an action for imputing perjury to an overseer in regard to his accounts, the traverse was "that at the time mentioned in the declaration the plaintiff had not been appointed and was not assistant overseer of the poor of [*&c.*], and had not made out and passed certain accounts of him, the plaintiff, as such assistant overseer as aforesaid, the same containing, amongst other things, an account of the receipts and disbursements of the plaintiff, as such assistant overseer, and which said accounts so made out as aforesaid, the plaintiff, before the committing of the grievances, had not verified on the oath of the plaintiff; and of this the defendant puts himself upon the country, &c."

### †3. *Plea that the Matter published is true.* (*p*)

*If the charge be Theft, the plea may be*—"And for a further plea in

(*p*) See Forms 2 Chit. Pl. 5th ed. 1031, 1033, 6th ed. 920, 926. Plea justifying that a charge of *perjury* is true; *id.* Plea that plaintiff was a *swindler*, as charged in a libel; Clarke *v.* Taylor, 2 Bing. N. C. 654. Plea to a declaration for a libel on a vendor of quack medicines, that the matters are true; Morrison *v.* Harmer, 3 Bing. N. C. 759. Plea to a libel on a proctor, that he had been suspended; Clarkeson *v.* Lawson, 6 Bing. 587. Plea to a libel on an attorney; Jones *v.* Stephens, 11 Price, 235. Plea that plaintiff did keep out of the way to evade process; Lay *v.* Lawson, 4 Ad. & E. 795. That plaintiff broke into defendant's cellar and got drunk; Toogood *v.* Spyring, 1 C. M & R. 184. Plea that plaintiff was insolvent; 2 Chit. Pl. 5th ed. 1034, 6th ed. 922. Where the charge against the plaintiff is in itself, on the face of the libel or words, of a certain and specific nature, and states the facts imputed in so perspicuous a shape, that the plaintiff must know at the trial what evidence he has to adduce to rebut the accusation, and the plea of justification can afford no further information, it is sufficient to allege generally in the plea, that the plaintiff committed the offence or was guilty of the misconduct, using the words of the charge; as if the words be that plaintiff stole a sheep of E. F., the plea may be; "that he did on &c., steal the said sheep," &c. But where the charge be general, as that plaintiff is a "thief," or "swindler," or had defrauded various persons, or was guilty of neglect, extortion, &c. as attorney; a general plea merely reiterating the charge, and not showing the *particular* occasion or instance of misconduct, the time, persons, &c., is bad; see 1 Saund. 244 a, 244 b, n. (*m*); 1 Stark. Sl. 2d ed. 478; 1 Chit. Pl. 6th ed. 537; Har. Ind. Defamation, 934; see J'Anson *v.* Steward, 1 T. R. 748; Jones *v.* Stevens, 11 Price, 235. In the latter case the Court said that general pleas of justification containing vague aspersions, ought to be demurred to, and that a demurrer for the uncertainty did not admit the truth of such general scandal. And if there be no demurrer, the defendant is entitled to a verdict on the plea, if proved, whatever disadvantages the plaintiff may have suffered by its vagueness; Edmonds *v.* Walter, 3 Stark. R. 7; 2 Chit. R. 791. Proof upon, and effect of a plea that the libel is true "in substance and effect;" Weaver *v.* Lloyd, 2 B. & C. 673; 1 C. & P. 295; 4 D. & R. 230, S. C. Where the charges in a libel or words are divisible, the plea may justify part of them, and if the rest be not actionable, the defendant may succeed thereon on the plea of not guilty; Clarke *v.* Taylor, 2 Bing. N. C. 654. In general it suffices that the *gist* and *substance* of the libellous matter charged are justified and covered by the matters of fact stated in the plea, and constituting the offence charged. In Morrison *v.* Harmer, 3 Bing. N. C. 759, the main charge against the plaintiffs was, that they compounded and sold poisonous and deleterious pills, and that defendant had crushed the system of poisoning pursued by the scamps and rascals; and the plea, (which was pleaded to the whole declaration,) chiefly charged that the pills were dangerous, &c., and the terms of general invective and reproach, as "scamp," "rascal," were not expressly

this behalf, [*or if some only of the words are justified, say*, "as to the *speaking* and publishing of and concerning the plaintiff, the following words in the declaration mentioned, to wit, ——;" *or in case of libel in part justified state*, "as to the *composing* and publishing of and concerning the plaintiff, the following part of the said supposed libellous matters in the declaration mentioned;" *or* "so much of the said libel as imputes to the plaintiff *perjury*," (*q*)] the defendant saith that [*actio non, if the plea be to part,*] the plaintiff, before the said time, when &c., to wit, on [*&c.*], feloniously did steal, take and †carry away certain goods and chattels, to wit, ——, of one E. F. of great value, to wit, £——, wherefore the defendant at the said time, when &c., committed the supposed grievance in the declaration mentioned, [*or if the plea be to part, say*, "in the introductory part of this plea mentioned,"] as he lawfully might for the cause aforesaid; and this the defendant is ready to verify, &c. [*Add prayer of judgment if the plea be to part only of the words of the libel, or words.*

### 4. *Replication, De injuria, in an Action for Libel or Slander.*

[The replication *de injuriâ*, (See the Form, *ante*, 625), which denies *all* the matters of fact stated in the plea, is sufficient, where the *truth* of the scandal, or other ground of justification, forms the subject of defence; see 1 Saund. 244, n. 7.]

## LICENSE.

[The plea will be similar to the Form in *Trespass*, substituting the word "grievances" for *trespasses*.]

LIEN. *See* "TROVER," PLEAS IN—"LIEN."

LIGHT. *See* "ANCIENT LIGHTS."

noticed in the plea. It was held that the plea was sufficient, the Court saying, that they could not understand those words, however offensive, as containing any charge different and distinct from that of which the truth had been justified in the first plea, and that they were not aware of any authority by which it is determined that the justification of the truth of the substantial imputation contained in a libel, is not sufficient, unless it extend also to every epithet or term of general abuse which *may be found in the description* or statement of such imputation. Mr Starkie, 2d ed. Ev. 420, observes, in regard to the evidence in support of a plea of justification in slander, that "there seems to be little if any difference between the evidence in proof of a specific charge thus involved in a civil proceeding, and the evidence which is essential to support an indictment for a similar charge." Cock *v.* Field, 4 Esp. C. 133; Chalmers *v.* Shackle, 6 C. & P. 475.

(*q*) Clarke *v.* Taylor, 2 Bing. N. C. 664.

## LIMITATIONS, PLEA OF THE STATUTE OF. (r)

And for a further plea in this behalf, the defendant says that the said several causes of action in the said declaration mentioned did not, nor did either of them *accrue* to the plaintiff (s) at any time within *six* years (t) next before the commencement of this suit; and this the defendant is ready to verify.

## MALICIOUS ARREST AND PROSECUTION.

[See Forms of declarations, &c., *ante*, 563 to 570. In case for a malicious prosecution or arrest, without probable cause, the plea of *not guilty* puts in issue the malice and question of probable cause, (as well as, it seems, the prosecution or arrest itself,) and the defendant is not allowed, in addition to that plea, to plead specially that there was reasonable ground for the prosecution; the malice and want of probable cause being part of the injury and the gist of the action; Cotton *v.* Browne, 3 Ad. & E. 312; 4 N. & M. 831; 1 H. & W. 419, S. C. See however the principle of Stancliffe *v.* Hardwick, 2 C. M. & R. 1; 3 Dowl. P. C. 762; 1 Gale, 127, S. C.; *post*, "Trover." But in an action for a malicious prosecution or arrest, the *determination* of the original prosecution or action is not, it seems, put in issue by the plea of not guilty. Thus, in an action for maliciously proceeding to outlawry, some of the judges thought that such plea did not deny the allegation of the reversal of the outlawry; Drummond *v.* Pigou, 2 Bing. N. C. 114; 2 Scott, 228; 1 Hodg. 190, S. C. The point was not however solemnly decided. It seems that in Combe *v.* Capron, 1 Mo. & Rob. 398, the plea denying that the original suit was ended as alleged, was simply "that the said suit was not ended or determined in manner and form as the plaintiff hath above alleged;" concluding to the country. Where the suit is alleged to have been determined by judgment as appears by the *record*, *nul tiel record* would seem to be a proper plea.]

(r) This is clearly a defence in confession and avoidance, and must be pleaded specially.

(s) *Not guilty* within six years, is a bad plea on demurrer, where the cause of action does not accrue immediately the grievance is committed; Pratt *v.* Swaine, 8 B. & C. 285; 2 M. & R. 250, S. C.; see Form of plea and replication in *assumpsit* and notes, *ante*, 345, 346. In trover, *post*, Trover; Tidd, N. P. 8.

(t) 21 Jac. 1, c. 16, s. 3. But actions upon the case for slander or *words*, must be brought within *two* years after the words spoken; *id.* As to the limitation by statute in particular cases of wrongs, see Tidd, 9 ed. 19; Tidd, N. P. 7; Har. Ind. Limitations.

## MARKETS.

[See cases, &c. referred to, *ante*, 570. If the plaintiff's title to the market be denied, traverse the introductory allegation of the right in the declaration, concluding to the country. The plea of not guilty would put in issue only the fact of encroachment on the plaintiff's right.]

## MASTER AND SERVANT.

[Declarations for seduction, enticing away servants, &c., *ante*, 570 to 574. In an action for *seduction*, *not guilty* has been held to put in issue, not merely the fact of seduction, but also the question whether the party seduced was the servant of the plaintiff, such being the gist of the action; Holloway *v.* Abell, cor. Littledale, J., Hereford Summer Assizes, 1836, 7 C. & P. 528; see further *ante*, 617. In Harris *v.* Butler, 2 M. & W. 539, (cited *ante*, 571, note (*x*),) the plea was, "that the said —— was not at the said times, when &c., or either of them, the servant of the plaintiff." If the defence be that the plaintiff consented to the connexion, plead License, see *ante*, 643.]

## †MISCHIEVOUS ANIMALS. (*u*)

### 1. *Plea that the Defendant's Dog attacked the Plaintiff because he irritated it.*

And for a further plea in this behalf the defendant says, that just before the said time, when &c., to wit, on the day and year in the declaration mentioned, the plaintiff, without the leave or license, and against the will of the defendant, and without any good, just, or reasonable cause or lawful occasion, greatly teased, annoyed, and irritated the said dog in the declaration mentioned, and that the said attack of the said dog upon, and the said biting of the plaintiff by the said dog in the declaration mentioned, were caused and occasioned by and through the said

(*u*) Declaration, &c. *ante*, 574. *Not guilty* is in general a sufficient plea in case for an injury done by the defendant's dog or cattle; for it puts in issue not only that the animal did the act complained of, and was of a savage disposition as alleged in the declaration, but also that the defendant kept it, knowing it to be so, the *scienter* not being *inducement*, but being part of the cause of action; Thomas *v.* Morgan, 5 Tyr. 1085; 2 C. M & R. 496; 1 Gale, 172, S. C.; and see Hogan *v.* Sharpe, 7 C. & P. 755, per Lord Abinger, C. B.; Tidd, N. P. Add. 650; see also *ante*, 616, 617.

teasing, annoying, and irritating of the said dog by the plaintiff as aforesaid, and of the plaintiff's own wrong, and not by, through, or in consequence of any habit, tendency, propensity, disposition, or custom of the said dog to attack or bite mankind; and this the defendant is ready to verify, &c.

### 2. *Plea that Plaintiff was warned not to go near the Dog, &c. but did so, wherefore, &c.*

And for a further plea in this behalf the defendant says, that before and at the said time when &c. in the declaration mentioned, he the defendant had caused the said dog to be tied and fastened up in a careful and proper manner in and upon a certain part of certain premises of him the defendant, where the plaintiff had not at the said time when &c. any [right or] occasion to pass; and the defendant further saith, that before and at the said time when &c. the plaintiff had been and then was warned and cautioned against going near to the said dog, or teasing and inciting the same; yet the plaintiff at the said time when &c. of his own wrong went near to the said dog, and then teased and incited the same, and thereby then caused the said dog to attack and bite the plaintiff, and commit the supposed injuries in the declaration in that behalf mentioned; and this the defendant is ready to verify, &c.

## NEGLIGENCE.

[See "Agents," "Bailees," "Carelessness," "Carriages," "Nuisances," †"Mischievous Animals," "Master," "Ships." The plea of not guilty puts in issue the defendant's neglect, default, or breach of duty, and all the facts as constitute a part of the cause of action or injury, without being matter of *inducement* of the plaintiff's right or title, see *ante*, 616, 617. A plea that "it was not the defendant's duty" to do, &c. as alleged, would be bad, as a traverse of a mere matter or inference of law, and not of facts, see *ante*, 619, note (*c*). Plea that the injury arose partly from the plaintiff's neglect, see *ante*, 621, Form 2, and *id.* note (*i*), and *post*, "Ships," 3 Chit. Pl. 6 ed. 929 to 931. In case for negligence, as in navigating a ship, &c. a plea that the plaintiff's misconduct caused the injury, showing the particulars, with a special traverse, "without this, that the damage was occasioned by the carelessness of the defendant," concluding to the country, is in effect only a plea denying defendant's neglect, or a plea of not guilty, and does not put defendant on strict proof of the inducement; and he may succeed on such plea on disproving his own carelessness; Cross Keys' Company *v.* Rawlings, 3 Bing. N. C. 71.]

## NUISANCES.

[See *Pleas*, "Ancient Lights," "Common," "Negligence," "Reversion," "Ways," "Watercourses." Forms of declarations and notes, *ante*, 575 to 583. The New Rules, in prescribing the effect of "not guilty" in *Case*, state, by way of illustration, that "in an action on the case for a *nuisance* to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only, that the defendant carried on the alleged trade *in such a way* as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house." Not guilty compels the plaintiff to prove not only an injurious or actionable nuisance, but also that the defendant was the person who caused it; Dawson *v.* Moore, 7 C. & P. 25. It compels the plaintiff to prove that he sustained an *injury* from the acts complained of. And it seems that if the defence were that the nuisance, if any, was of a *public* nature, and that the plaintiff has not sustained any special damage, enabling him to sue, (see *ante*, 640, note (*n*)) the plea of not guilty would be sufficient to raise the question. However, in the case in which the Form 4, *ante*, 580, was used, the judge allowed the defendant, upon a summons to plead several matters, to plead the following plea in addition to not guilty, viz. "that the said horse of the plaintiff did not sink into the said part of the said highway, nor was entangled therein, nor did the said horse fall down and become, nor was the said horse cut, lacerated, wounded, or in any way injured, disabled, disfigured, lamed, or lessened in value, nor was the plaintiff in any way whatever injured or damnified by reason of the defendant putting and having left the said part of the said highway in a dangerous, insecure, †loose, soft, hollow, and improper state and condition as in the said declaration is alleged; and of this the defendant puts himself upon the country, &c."

A declaration for a nuisance contains an inducement of the plaintiff's right or title to, or easement in, or possession of, the property or thing affected; as that the plaintiff was entitled to the enjoyment of the support of defendant's house or foundations, &c. or was entitled to the enjoyment of water, &c. or was possessed of a house, &c. These inducements or allegations of right are preliminary matter—not part of the *injury*—and must be specially traversed in the words of the averment, concluding to the country, if meant to be disputed; *ante*, 615. In Trower *v.* Chadwick, 3 Bing. N. C. 339, cited *ante*, 576, note (*d*), the second plea was, "that the vault or cellar of the plaintiff in the first count mentioned, did not rest upon, nor was of right supported by parts of the said adjoining vaults, and of the said walls in that count mentioned, in manner and form as the plaintiff hath above alleged; and of this the defendant puts himself upon the country, &c.: 3dly, that the plaintiff was not be-

fore, and at, and during the times in the first count in that behalf mentioned, or at either of those times, of right entitled that their said vault or cellar should be supported by the said parts of the said adjoining vaults and walls in that count mentioned, in manner, &c.; and of this, &c." A plea denying possession of a house would be "that the plaintiff was not at any or either of the said times when &c. possessed of the said messuage, &c. or any part thereof in manner, &c. and of this, &c." If the defendant admit the nuisance but justify it on the ground of license or length of time, &c., he must plead specially. In Elliotson *v.* Feetham, 2 Bing. N. C. 134; 2 Scott, 174; 1 Hodg. 259, S. C.; which was an action on the case for a noisy nuisance near plaintiff's house, which he was possessed of for a term of years, a plea that defendants had been possessed of certain workshops in which the noise was made *ten* years before the plaintiff was possessed of the term in his house, and that they had always during that time made the noise in question, which was necessary for carrying on their trade, was held ill on demurrer to the replication. The court intimated that the defendants should at least have alleged a holding of *twenty* years duration. Subject to that alteration, the form of plea in that case as given in the reports may be found useful.]

## PATENTS.(x)

### 1. *That the Plaintiff is not the Inventor.*(y)

And for a further plea in this behalf the defendant says, that the plaintiff †[*or* "the said S. P."] was not the true or *first* inventor of the said improvements in the said declaration mentioned, in manner and form as the plaintiff hath above in that behalf alleged; and of this the defendant puts himself upon the country, &c.

### 2. *That the Specification does not sufficiently describe the Invention.*(y)

And for a further plea in this behalf the defendant says, that the nature of the said invention in the said declaration mentioned, and the manner in which the said invention was and is to be performed were not, nor are they particularly described or ascertained according to the true

(x) See form of declaration and notes, *ante*, 584. The plea of not guilty would traverse the mere fact of infringement only, admitting the novelty &c. of the invention; that plaintiff was the inventor; the grant of the patent and the enrolment of the specification, and its sufficiency. On account of costs (see *ante*, 584, note (*i*),) it is unwise to dispute the validity of the patent unnecessarily. See form of notice of objections, to be delivered with the pleas, *post*, 650, Form 7.

(y) See Forms, Derosne *v.* Fairie, 2 C. M. & R. 476; 1 Gale, 109, S. C.; Morgan *v.* Seaward, 2 M. & W. 545; Cornish *v.* Keene, 3 Bing. N. C. 572.

intent and meaning of the said letters patent in or by the said specification in the said declaration in that behalf mentioned, in manner and form as the plaintiff has in that behalf above alleged; and of this the defendant puts himself upon the country, &c.

### 3. *That the Invention was not New.*(z)

And for a further plea in this behalf the defendant says, that the said supposed invention in the declaration mentioned was not at the time of making and granting the said letters patent a new invention, but, on the contrary thereof, had been wholly and in part publicly and generally practised, used, and vended, to wit, within that part of the united kingdom of Great Britain and Ireland, called England, before the date and grant of the said letters patent, to wit, on [*&c.*], and on divers other days between that day and the date and grant of the said letters patent, by reason whereof the rights, liberties, privileges, benefits, monopolies, and advantages by the said letters patent granted, and the prohibitions therein contained were at the time of the making and granting of the said letters patent, and from thence hitherto have continued to be, and at the said several times when &c. were and still are wholly void and of no effect, and the same are wholly lost and forfeited to and by the plaintiffs; wherefore the defendant at the said several times when &c. committed the said several supposed grievances in the said declaration mentioned, as he lawfully might for the cause aforesaid; and this the defendant is ready to verify, &c.

### †4. *That the Invention is of no Public Benefit.* (a)

And for a further plea in this behalf the defendant says, that the said invention in the said declaration mentioned, was not at the time of making and granting the said letters patent, nor has the same been at any time from thence hitherto, nor is the same of any public or general use, benefit, or advantage whatsoever, nor was, nor is the same in truth, or in fact, any improvement whatsoever, or in any way beneficial to the public, by reason whereof the rights [*&c. proceeding and concluding as in the preceding plea.*

(z) See forms, &c. Cornish *v.* Keene, 3 Bing. N. C. 572; Bowman *v.* Taylor, 2 Ad. & E. 281; Morgan *v.* Seaward, 2 M. & W. 545. In the latter case the question what was a publication of the invention prior to the patent, sufficient to avoid the grant, was much discussed.

(a) See Forms, Morgan *v.* Seaward, 2 M. & M. 545; Cornish *v.* Keene, 3 Bing. N. C. 572.

### 5. *Plea that the Invention is prejudicial and inconvenient to the Public.* (*b*)

And for a further plea in this behalf the defendant says, that the said supposed invention in the said declaration and letters patent, and instrument in writing mentioned, at the time of the said grant was and from thence hitherto hath been and still is prejudicial and inconvenient to the subjects of our lady the queen in this, to wit, that lamps made with and according to the said supposed improvement and invention, or upon the principle thereof, were and are subject and liable and calculated to burst and explode and blow up, and thereby to injure persons then being near the same, and to communicate fire to any combustible articles, or other articles and things capable of catching fire then being near the same, and also to break, injure, and destroy glass and other articles and things being near such lamps on the occasion of their bursting, exploding, and blowing up as aforesaid; and this the defendant is ready to verify.

### 6. *That the Infringement was before the Disclaimer, &c. mentioned in the Declaration.* (*c*)

And for a further plea as to so many of the said supposed grievances in the said declaration mentioned, as were committed before a certain day, to wit, the —— day of ——, A. D. ——, the defendant says, that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said disclaimer and memorandum of alteration of the plaintiff in the said declaration mentioned, were not entered or enrolled until the said —— day of ——, A. D. —— aforesaid, and until after the committing of the said several supposed grievances in the introductory part of this plea mentioned; and that the said invention for which the said letters patent were originally granted, and to which, until the entry and enrollment of the said disclaimer and memorandum of alteration, the said letters patent applied and extended, and which said invention is mentioned, specified, described and set forth in the said letters patent and specification, was not at the time of making and granting the said letters patent a new invention, but on the contrary thereof had been, as to a material part thereof, publicly and generally practised, used, and vended, to wit, within that part of the united kingdom of Great Britain and Ireland called England, before the date of the said letters patent, to wit, on [*&c.*], and on divers other days and times between that day and the date of the said letters patent; By reason whereof the rights [*&c.*] were at the time of making and granting the said letters patent and of enrolling the said specification and at the said several times when &c.

(*b*) See *id.*

(*c*) See *ante*, 584, note (*i*). The above is the form of the plea in Perry *v.* Skinner, 2 M. & W. 471, cited *ante*, 584, note (*i*).

before the said —— day of ——, A. D. ——, and from thence respectively until the entry and enrollment of the said disclaimer and memorandum of alteration, and until and after the committing of the said supposed grievances in the introductory part of this plea mentioned, continued to be wholly void and of no effect, wherefore the defendant at the said several times when &c. in the said declaration mentioned, before the said —— day of ——, A. D. ——, and whilst the said privileges, benefits, monopolies, advantages, and prohibitions, were so void and of no effect as aforesaid, committed the said several supposed grievances in the introductory part of this plea mentioned, as he lawfully might for the cause aforesaid; and this the defendant is ready to verify; wherefore he prays judgment if the plaintiffs ought to have or maintain their aforesaid action against him in respect of the said several supposed grievances in the introductory part of this plea mentioned, &c.

### 7. *Notice of Objections to Patent, &c.; to be given with the Pleas.* (*d*)

In the ——. Between [*&c.*]

The defendant in this action, besides denying that he has infringed the letters patent in the declaration mentioned, means at the trial of this action to rely also upon the following objections, that is to say, That the patentees were not the inventors of the improvements for which the patent is said to be in force;—That the specification and disclaimer do not sufficiently describe the nature of the invention, and the manner in which it is to be performed;—That the invention does not produce the effect stated in the specification, nor is such effect produced by the plaintiffs, nor was it produced by the original patentee in the manner there stated;—That the invention was not new, and was either wholly or in part used and made public before obtaining the letters patent;—That it is not beneficial to the public;—That it does not essentially differ from other similar inventions which were in public use at or before the granting of the patent; and also that the patent, when originally granted, being void in consequence of part of the invention first claimed in the specification, and since disclaimed, not being new, and having been in use before the patent was granted, the infringement of that patent before the disclaimer was lawful, and that the subsequent disclaimer was of no avail to render illegal those acts which when committed were perfectly legal. And the defendant hereby gives notice to the plaintiff of the said objections, according to the form of the statute in such case made and provided.

Dated [&c.]

To the above named plaintiff,
and to ——, his attorney
or agent.

Yours, &c.
——,
Defendant's attorney.

(*d*) See 5 & 6 W. 4, c. 83, s. 5, cited *ante*, 548, note (*i*). This was the form of notice in Perry *v.* Skinner, cited *ante*, 548, note (*i*).

### 8. *Replication, that the Invention is New.*

And as to the plea by the defendant —— above pleaded the plaintiffs say, that the said invention in the said declaration mentioned, was at the time of making and granting the said letters patent a new invention, and had not at any time before the date of the said letters patent been wholly or in part publicly or generally practised, used, or vended in England, in manner and form as the defendant hath in the said —— plea alleged; and this the plaintiffs pray may be inquired of by the country, &c.

### 9. *Replication, that the Invention was Useful, &c.*

And as to the plea of the defendant by him —— above pleaded the plaintiffs say, that the said invention in the said declaration mentioned was at the time of making and granting the said letters patent, and afterwards and still is of public and general use, benefit, and advantage, and the same was and is in truth and in fact an improvement and beneficial to the public; and this the plaintiffs pray may be inquired of by the country, &c.

## PYAMENT INTO COURT.

[Money may be paid into Court, *by leave* of the Court or a judge, on application for the purpose, in all actions on the *case*, &c. (except actions for assault and battery, false imprisonment, *libel*, *slander*, *malicious arrest or prosecutions*, crim. con. or seduction;) see *ante*, 369, note (*z*); as in trover; Cook *v.* Nicholson, 6 C. & P. 712; see form there; or by a landlord for dilapidations, &c.; Woods *v.* Pope, *id.* 782. The form of the plea in case will be as in *assumpsit*, *ante*, 369. Money may be paid into Court as to part of the grievances; see Form, &c. *ante*, 370, and note *id.*; *ante*, 618, Form 2; 642, Form 3. Form where the money was paid into Court before †declaration, *post*, "Trespass," Pleas, "Payment." As to payment into Court by a carrier, see *ante*, 622, note (*k*).]

## PEWS.

[See *ante*, 587, tit. "Pews." The plea of not guilty would deny only the fact of disturbance; and in order to dispute the plaintiff's title there must be an express traverse of the allegation of such title in the introductory part of the declaration, concluding to the country.]

## POUND BREACH.

[In an action for pound breach or rescue (*ante*, 587) the plea of not guilty would seem only to deny the fact of the rescue or pound breach; admitting the tenancy and distress for rent, (and, perhaps, the impounding,) which should therefore, when disputed, be specially denied.]

## RECTOR. *See* "WASTE," "TITHES."

[In an action against the executor of a deceased rector, &c. for dilapidations to the rectory (*ante*, 588), the plea of not guilty would put in issue only the dilapidations, admitting the introductory matters, which can be disputed only by a special plea.]

## RELEASE.

[See Form in *assumpsit*, *ante*, 374; which will apply in *case*, stating that, "after the committing of the said several grievances in the said declaration mentioned, and before," &c.]

## RESCUE. *See* "POUND BREACH."

## REVERSION. (*e*)

1. *Denial of the Plaintiff's reversionary Interest in the House, &c. stated to have been injured.*

[See Forms 1, 2, *ante*, 637.]

(*e*) It is clear that not guilty would not put in issue the inducement of plaintiff's title in reversion to the property stated to have been injured, to the prejudice of the reversionary interest; see *ante*, 614, 615. *Semble*, defendant might plead *liberum tenementum*. Where the acts complained of are *justified*, of course there must be a special plea accordingly; see Griffiths *v.* Jones, 1 M. & W. 731.

### †2. *Plea in Case for an Injury to the Plaintiff's reversionary Interest in Goods, denial of his Title.*

And for a further plea in this behalf, the defendant says, that the plaintiff was not the owner or proprietor of the said goods and chattels in the said declaration mentioned, nor did the said supposed reversionary property and interest therein in the said declaration mentioned, belong to the plaintiff in manner and form as the plaintiff hath above alleged; and of this the defendant puts himself upon the country, &c.

RIOT. *See* "HUNDRED."

SEDUCTION. *See* "MASTER AND SERVANT."

SERVANTS. *See* "AGENTS," "MASTER AND SERVANT."

## SHERIFFS.(*f*)

### 1. *Plea in Case against a Sheriff for falsely returning nulla bona to a fieri facias, that the Defendant did not seize the Goods, &c.*

And the defendants, by —— their attorney, as to the first count of the said declaration, say, that they, the said defendants, as sheriff of the said county of Middlesex as aforesaid, under the said writ in the said first count mentioned, did not seize or take in execution the said supposed goods and chattels of the said F. W., in the said declaration mentioned, or any or either of them, or any part thereof, *nor* (*g*) did they, the said defendants, levy thereout the moneys indorsed on the said writ, and directed to be levied as aforesaid, or any part thereof, in manner and form as the plaintiff hath above alleged; and of this they put themselves upon the country, &c.

### 2. *Plea to a Declaration for not seizing Goods under a fieri facias, that there were not such Goods.*

And for a further plea as to the second count of the said declaration,

(*f*) As to the effect of *not guilty* in an action against the sheriff for an *Escape*, *&c.*, see *ante*, 627 to 630, and notes.

(*g*) A plea that defendants did not seize *and* levy would be bad, as raising too large an issue; Stubbs *v.* Lainson, 1 M. & W. 728.

the defendants say, that there was not at the time of the delivery of the said writ to them, the defendants, or at any time afterwards, and before the said return thereof, any goods or chattels of the said F. W. within the said bailiwick of the defendants, as such sheriff as aforesaid, whereof the said defendants, or either of them, had notice, or could or might or ought to have levied the said moneys indorsed on the said writ, and directed to be levied as aforesaid, or any part thereof, in manner and form as the plaintiff hath above alleged; and of this the defendants put themselves upon the country, &c.

### 3. *That the Plaintiff directed the Defendants not to execute the Writ.*

And as to the first and second counts of the said declaration (*k*) the defendants say, that though true it is that they, as such sheriff of Middlesex as aforesaid, did seize and take in execution the said goods and chattels of the said F. W. as in the first count of the said declaration mentioned; and though true it is that after the delivery of the said writ to the said sheriff, and before the return thereof, there were other goods and chattels of the said F. W. in the bailiwick of the said defendants, as such sheriff as aforesaid, whereof the defendants might have levied part of the said moneys indorsed on the said writ; nevertheless, for plea to the said several counts, the defendants say, that after the delivery of the said writ to the said defendants, as such sheriff as aforesaid, and before the said return thereof, to wit, on [*&c.*] the plaintiff directed the defendants under the said writ not to levy the said moneys on the said goods and chattels in the said first count mentioned. And the plaintiff then discharged the defendants from further executing the said writ on the said goods and chattels in the said first and second counts mentioned; and this the defendants are ready to verify.

### 4. *That the Defendants, as Sheriff, did not execute the Writ, because there was a bona fide Execution at the suit of a third Person in their hands, and Plaintiff's Execution was fraudulent.* (*i*)

And the defendants, for a further plea as to the first and second counts of the said declaration, say, that heretofore, to wit, on [*&c.*], one J. F. in the Court of our lady the queen, before the queen herself, by the consideration and judgment of the same Court recovered against the said F. W. a certain debt of £——, (or if in *assumpsit*, *see the* Form 1, *ante*, 431), and also 65 shillings costs, which in and by the same Court were adjudged to the said J. F., and with his assent, for his damages which he

(*k*) The first count was for a seizure and false return, the second for not taking goods seizable, under the same writ.

(*i*) Wormall *v.* Young, 5 B. & C. 660; 8 D. & R. 442, S. C.

had sustained as well by occasion of the detaining of the said debt, as for his †costs and charges by him about his suit in that behalf expended; whereof the said F. W. was convicted, as by the record and proceedings thereof still remaining in the said Court appear. And the said debt and damages remaining unpaid and unsatisfied after the delivery of the said writ in the said declaration mentioned to the defendants, to wit, on [*&c.*], for the obtaining satisfaction of the said judgment the said J. F. sued and prosecuted out of the said Court a certain writ of our lady the queen, called a fieri facias, directed to the sheriff of Middlesex, by which said last mentioned writ her majesty commanded the said sheriff that of the goods and chattels in his, the said sheriff's, bailiwick of the said F. W., he should cause to be levied the debt and damages last mentioned; and that the said sheriff should have that levy before our said lady the queen at Westminster, on [*&c.*] [*or*, "forthwith,"] to render to the said J. F. for his debt and damages aforesaid, which said last mentioned writ with an indorsement and direction there to levy £——, besides [*copy indorsement*] was then delivered to the defendants, then being such sheriff as aforesaid, to be executed in due form of law; and the defendants further say, that the said writ in the said declaration mentioned, was issued out of the said Court of [*&c.*] and delivered to the defendants fraudulently and for the purpose and with the intent to defraud and delay the said J. F. and other creditors of the said F. W. in the recovery of their just debts, contrary to the form of the statute in such case made and provided; wherefore the defendants, as such sheriff as aforesaid, did then levy part of the debt and damages of the said J. F. under and by virtue of the said writ at the suit of the said J. F., on the said goods and chattels in the said first and second counts mentioned, with this, that the said goods and chattels in the said first and second counts mentioned were not sufficient to satisfy the moneys indorsed on the said last mentioned writ, and thereby directed to be levied; and this the defendants are ready to verify.

## SHIPS.

### 1. *Plea to Declaration for carelessly running down Plaintiff's Vessel, that Defendant was not possessed and had not the care of the Vessel alleged to have come in contact with Plaintiff's Ship. (k)*

And for a further plea in this behalf, the defendants say, that they were not nor was either of them, at the time of the committing of the

(*k*) *Not guilty* would merely deny the carelessness of defendant, and that it occasioned the injury stated. It would admit that *plaintiff* was possessed of his ship as alleged; and it has been usual to plead as above, where defendant denies that *he* was owner, &c. of the other vessel; see *ante*, 621, n. (*h*).

It seems that where the defendant or the master of his ship were bound under the

supposed †grievances above laid to their charge, possessed of the said ship or vessel in the said declaration secondly mentioned, nor had they, nor had either of them by their servant or servants, or otherwise, the care, or direction, or management of the same, in manner and form as the plaintiffs hath above thereof complained against them; and of this they the defendants put themselves upon the country, &c.

### 2. *Plea to a Declaration for an Injury to the Plaintiff's Ship, that the Injury was occasioned partly by the carelessness of Plaintiff's Crew.* (*l*)

And for a further plea in this behalf, the defendant says, that before and at the time of committing the said grievances in the declaration mentioned, the said brig or vessel of the plaintiff was in the river Thames, under the direction and management of certain then servants of the plaintiff; and the defendant further says, that before and at the said time when, &c. the said steam vessel of the defendant was lawfully proceeding in the said river Thames; and the defendant further says, that the plaintiff by his said servants as aforesaid, so carelessly, negligently, improperly, and unskilfully steered, guided, managed, and directed his said brig or vessel, that as much by and through such carelessness, negligence, improper conduct, and unskilfulness of the plaintiff by his said servants as aforesaid, in the steering, guidance, management, and direction of his said brig or vessel, as by the carelessness, negligence, or improper conduct of, by, or on the part of the defendant by his servants in that behalf, in and about the care, steering, guidance, government, direction, and management of the said steam vessel of the defendant, the said steam vessel of the defendant ran foul of and struck against the said brig or vessel of the plaintiff, and forced and drove the said brig or vessel of the plaintiff against the said other vessel in the said river Thames, and occasioned the said supposed damages and injuries to the said brig or vessel of the plaintiff, in the declaration mentioned; and this the defendant is ready to verify, &c.

### 3. *Replication thereto.*

And as to the plea of the defendant by him lastly above pleaded, the

act of parliament to take, and had, a licensed *pilot* an board, at the time of the collision, and the vessel was then under the charge of the pilot; the owners and master are not liable for the damage done to the other vessel by the carelessness, &c. of the pilot. See *ante*, 594, note (*d*). This defence might be relied upon under a "plea that defendants had not the care," &c. as above, because where the defendants' vessel is necessarily in the charge of a pilot, it is not true as alleged in the declaration, that the defendant had the care, government, &c. thereof. See Abbott, Ship. 5th ed. 160; see further, *ante*, 594, 595, and declarations there.

(*l*) See Vennall *v.* Garner, 1 C. & M. 21; The Ligo, 2 Hagg. Adm. R. 356; *ante*, 621, Form 2, and *id.* note (*i*). See a special traverse of defendant's neglect, with an inducement of plaintiff's carelessness, &c., Cross Keys Co. *v.* Rawlings, 3 Bing. N. C. 71; cited *ante*, 646.

plaintiff saith, that the said steam vessel of the defendant at the said time when, &c. wholly by and through the carelessness, negligence, and improper †conduct of and by and on the part of the defendant by his said servants in that behalf, in and about the care, steering, guidance, government, direction, and management of the said steam vessel of the defendant, and not as much by and through the carelessness, negligence, and improper conduct and unskilfulness of the plaintiff by his said servants in the steering, guidance, and management and direction of the said brig or vessel, as by the carelessness, negligence, and improper conduct of and by and on the part of the defendant by his servants in that behalf, in and about the care, steering, guidance, government, direction, and management of the said steam vessel, ran foul of and struck against the said brig or vessel of the plaintiff, and forced and drove the said brig or vessel of the plaintiff against the said other vessel in the said river Thames, and occasioned the said damages and injuries to the said brig or vessel of the plaintiff, as in the declaration mentioned, and in manner and form as the plaintiff has in and by his said declaration thereof complained against the defendant; and this the plaintiff prays may be inquired of by the country, &c.

## SLANDER. *See* "LIBEL."

## SURGEONS.

[In an action on the case against a medical man for neglect, see *ante*, 597, the plea of not guilty would put the plaintiff upon proof of the breach of duty, but not of the retainer, which, if disputed, must be denied by a special plea, see *ante*, 614, 619.]

## TENDER.(*m*)

### *Tender of amends in an Action against a Railway Company for neglect, &c. to the Plaintiff's injury.* (*n*)

And the defendants, by —— their attorney, say, that the said acts and

(*m*) In general a *tender* before action cannot be pleaded in an action *ex delicto*. But in many cases, by statute, a tender of amends before action may be effectually made and pleaded. See plea of tender of amends in an action for an irregular *distress*, *ante*, 627, Form 6.

(*n*) See the form of declaration to which the above was pleaded, *ante*, 579. The private act enabled the Company to tender amends, &c. This plea was settled by an eminent barrister, who was of opinion that it was not necessary to pay the money into Court; stating that at least he could find

grievances in the declaration mentioned, and in respect whereof the said action is brought, were and each of them was committed in the execution of a certain act of parliament passed in the —— year of the reign of his late majesty King William the Fourth, intituled "An Act for making a Railway from —— to ——," being the railway in the declaration mentioned, and that after the committing of the said grievances, and before the commencement of this suit, that is to say, on [*&c.*] they the defendants tendered and offered to pay to the plaintiff a large sum of money, to wit, the sum of £——, as and for amends for the said grievances so committed, which said sum of £—— so tendered and offered as aforesaid, was and is sufficient amends for the said grievances, and which said sum of £—— so tendered, the plaintiff then wholly refused to accept and receive; and this the defendants are ready to verify, &c.

TOLLS. *See* "MARKET."

TROVER—PLEAS IN; *see post.*

TURBARY. *See* "COMMON."

WAGGON OFFICE KEEPER.

[In an action against a waggon office keeper for not forwarding or losing goods, see *ante*, 599, not guilty would deny the neglect or breach of duty, but not the receipt of the goods, for the purpose stated in the declaration. See Forms of Pleas, *ante*, 622, and note (*k*).]

WARRANTIES. *See* "FRAUD," *ante*, 528, 530, Forms 1, 3.

WASTE. *See* "LANDLORD AND TENANT," "REVERSION."

no authority on the subject later than Bacon's Abridgment, Tender, P. 6, where the plea was without it, and it was said that if the plaintiff chose to stop and pay all the costs after the tender, he might by rule of Court compel the defendant to pay him the amount tendered, but the plea of the tender of amends by a justice was considered good without any payment into Court. The plaintiff signed judgment, because the money was not paid into Court, in the above case against the Railway Company, but the Judge (on summons) after hearing counsel, set aside the judgment. February, 1837, MS.

## WATERCOURSES. (o)

### 1. *Denial of Plaintiff's Right to the Use of the Water. (p)*

And for a further plea in this behalf, the defendant saith that the plaintiff ought not at any or either of the said times, when, &c., *by reason of his possession of his said mill, land and premises*, (q) to have had or enjoyed, nor ought he still to have or enjoy the benefit or advantage of the water of the said stream or watercourse so *diverted* and *obstructed* [*using the words in the declaration*,] as aforesaid, nor ought the water of the said stream or watercourse so diverted and obstructed as in the said declaration mentioned, of right to have run or flowed, nor ought the same to run or flow to the said mill, land and premises of the plaintiff in manner and form as the plaintiff hath above alleged: and of this the defendant puts himself upon the country, &c.

### 2. *Another Form, denying the Plaintiff's Title.*

And for a further plea in this behalf, the defendant says that the plaintiff ought not before or at either of the said times, when, &c., in the declaration mentioned, of right to have had or enjoyed, nor ought he of right still to have or enjoy the benefit and advantage of the water of the said stream or watercourse, nor ought the water of the said stream or watercourse or any part thereof of right to have run and flowed, nor had the same of right to have run and flowed, nor ought the same still of right to

(o) As to the form of declaration and law on this subject, see *ante*, 601 to 611, and notes. In an action on the case for diverting or disturbing a watercourse, to the benefit whereof the plaintiff is entitled, the plea of *not guilty* puts in issue the mere *fact* of diversion or disturbance by the defendant. It admits the plaintiff's possession of his premises, and his *title* or *right* to the enjoyment of the water, as laid in the declaration; Frankum *v.* Earl of Falmouth, 2 Ad. & E. 452; 4 N. & M. 330; 1 H. & W. 1; 6 C. & P. 529, S. C.; cited and observed upon, *ante*, 615, 616; Tidd, N. P. 366; 5 N. & M. 268, (*a*). See Form 1, *supra*, 658, where the defendant *justifies* the obstruction on the ground that he has a right by prescription or grant to use the water in a particular manner, (see Wright *v.* Williams, 1 M. & W. 77; 1 Tyr. & G. 375, S. C., and form there); or that the plaintiff had wrongfully penned back the water, &c.; Frankum *v.* Earl of Falmouth, 6 C. & P. 529; the plea should be special. Justification by commissioners of a level, *post* Form 4; License, &c., Liggins *v.* Inge, 7 Bing. 682; 5 M. & P. 712. See Forms in Trespass, tit. "Watercourses."

(p) See Forms Frankum *v.* Earl of Falmouth, *supra*; Thomas *v.* Thomas, 2 C. M. & R. 36, 37; 1 Gale, 62. We have seen that in case for diverting a watercourse, a general form of alleging in the declaration the plaintiff's right to the benefit of the water, was held sufficient before the Prescription Act, 2 & 3 W. 4, c. 71, and is expressly sanctioned by that statute; see *ante*, 601, Form 1, 498, note (*b*). And it is provided that "if the general allegation be denied, all and every the matters in this act mentioned and provided which shall be applicable to the case, shall be admissible in evidence to rebut or sustain such allegation." Sect. 5.

(q) This must depend on the words of the declaration. As to the allegation, "by reason," &c.; see *ante*, 502, note (*m*). If omitted in the declaration, omit it in the traverse.

run and flow therefrom through the said supposed dent or crevice in the embankment of the said stream into the said ditch, and from thence unto and into the said close of meadow land, for the irrigating and watering the said close, and the benefit and improvement of the soil thereof in manner and form as the plaintiff hath in the said declaration above alleged; and of this the defendant puts himself upon the country, &c.

3. *Plea, to Declaration (ante,* 607,) *against Sewer Commissioners for Obstructing a Drain, denial of Plaintiff's Right to Drainage.*

And for a further plea the defendant, as such clerk as aforesaid, says that the plaintiff was not of right entitled that the waters, from time to time collecting and being in and upon the said lands of the plaintiff, should run and be drained, discharged and carried off and away from the same lands unto and into and through the said Shire drain, and from thence through other drains and places and into the sea, in manner and form as the plaintiff hath above in his declaration in that behalf alleged; and of this also the defendant, as such clerk as aforesaid, puts himself upon the country, &c.

4. *That the Obstruction was necessary to enable the Commissioners to make a Weir and Bridge according to certain Acts of Parliament; (see Declaration, ante,* 607, Form 4.)

And for a further plea the defendant, as such clerk as aforesaid, says that heretofore and after the making and passing of the said acts of parliament in the declaration first and secondly mentioned, in order to enable the said North Level Commissioners to place and fix, and to cause to be placed and fixed at and across the Shire Drain, at the place of its intersection by and with the said drain mentioned in the said act of parliament in the declaration first mentioned, and called the North Level Main Drain, a weir or overfall, with proper and sufficient buttresses, fences and foundations for the purposes of preventing any water from passing out of the said Shire Drain into the said Main Drain, at a lower level or fall at such weir or overfall than twelve inches below the cell of the said sluice in the said act mentioned, called Hill's Sluice, situate in the said Shire Drain, and of preventing any soil whatsoever from passing out of the said Shire Drain into the said Main Drain, so that such weir or overfall should be placed, fixed, kept and maintained at a level of at least twelve inches below the cill of the said last-mentioned sluice, and to erect and complete, for the use and convenience of all her majesty's liege subjects, across the said drain called the Shire Drain on the northern side of the said North Level Main Drain, to connect together the northern bank of the said North Level Main at the place where such bank was in-

tersected by the said Shire Drain, a good and substantial public carriage bridge with proper and sufficient parapets or rail-fences thereon, and a proper and convenient carriage, shipway or slope and approach thereto from the highway, which at the time of the passing of the act in the declaration secondly mentioned, was lying on the southern side of the said Shire Drain, leading from Tid Gote in the said act mentioned towards the said Kinderley's Cut, it was necessary for the said commissioners to stop and choke up and obstruct the said Shire-Drain, and to keep and continue the same so stopped and choked up and obstructed for a short space of time, in order to pen back divers large quantities of the water from time to time, during such space of time, being in the said Shire Drain; wherefore the said North Level Commissioners, in order to enable themselves to place and fix, and to cause to be placed and fixed such weir or overfall as aforesaid, and to erect and to complete such bridge, did, after the passing of the said acts of parliament in the declaration firstly and secondly mentioned, to wit, on the said day in the declaration first mentioned, stop, choke up and obstruct the said Shire Drain, and did keep and continue the same so stopped and choked up and obstructed for a short space of time, to wit, from the day last aforesaid until and upon a certain other day, to wit, the —— day of —— A. D. ——, the same being a short and reasonable space of time for the purpose aforesaid, which are the supposed grievances in the declaration mentioned; and this the defendant, as such clerk as aforesaid, is ready to verify.

## WAYS. (r).

### *Plea, denying Plaintiff's Right of Way.*

And for a further plea in this behalf, the defendant says that the plaintiff ought not at either of the said times when, &c., *by reason of his possession* (s) *of the said messuage* with the appurtenants, to have had nor

(r) See forms of declarations and law as to Ways, *ante*, 611 to 613, and notes. By the New Rules, in an action on the case for obstructing a right of *way*, the plea of not guilty "will operate as a denial of the *obstruction* only, and not of the plaintiff's *right* of way." And we have seen that under a traverse of the general allegation of right in the declaration, the defendant may show any thing which, under the Prescription Act, rebuts the claim; see *ante*, 498, note (*b*). The observations upon the pleas in case for obstructing a *watercourse* (*ante*, 658, 659, notes,) are in general equally applicable in an action for obstructing a way; see Rosc. Ev. 4th ed. 348. As to justifying specially, see *ante*, 659, note (*o*). In Wilkins *v.* Hungerford Market Company, 2 Bing. N. C. 283; 1 Hodg. 281, S. C., which was an action for obstructing a public thoroughfare, to the injury of plaintiff's business, the pleas were, 1st, Not guilty; 2dly, That defendants did not keep and continue the thoroughfare in the declaration mentioned, leading from, &c., shut and closed up, nor did they obstruct the said thoroughfare and thereby or by any or either of the means aforesaid, hinder or prevent the plaintiff from carrying on his said trade or business, *modo*, &c., concluding to the country. *Semble*, not guilty puts in issue the special damage charged in the declaration; see *ante*, 617, 640, note.

(s) Omit the words in italics if not in the declaration.

ought he still of right to have the said supposed way from the said messuage, unto, into and through and over the said *close*, and from and out of the same unto and into the said common *highway*, and so back again from the said highway, unto and into, through, over and along the said close, and from and out of the same, unto and into the said messuage of the plaintiff, [*describing the way as in declaration*,] for himself and his servants on foot or with *horses, cattle* and *carriages*, or either of them [*this depends on the form of the declaration*, (*t*)] to go, return, pass and repass every year, at all times of the year, at his and their free will and pleasure in manner and form as the plaintiff hath above alleged; and of this the defendant puts himself upon the country, &c.

WINDOWS. *See* "ANCIENT LIGHTS."

†WITNESSES.

[Declaration against a witness for not obeying a subpœna; *ante*, 613. See form of plea in such action, Betteley *v.* M'Leod, 3 Bing. N. C. 405; 4 Scott, 131. Not guilty would put in issue only the default or breach of duty, and not the inducement of the preliminary proceedings not constituting part of the injury.]

(*t*) See *ante*, 611, note (*k*).

# TROVER—DECLARATIONS IN. (a)

## 1. *Common Declaration in Trover.* (b)

For that whereas the plaintiff heretofore, to wit, on [*&c. any day be-*

(a) Trover (from *trouver*,) which is a special action on the case, per Parke, J. Smith *v.* Goodwin, 4 B. & Ad. 420, was originally a form of action designed as a remedy for the *loser* against the *finder* of goods, who refused to restore them on demand, and converted them to his own use. The allegations of loss and finding are still retained in the declaration, but are usually fictitious, and the defendant is not now allowed to traverse them. If he has been guilty of a conversion it is immaterial *how* he became possessed of the goods, whether rightfully or wrongfully, in the first instance. In this action the plaintiff does not, as in *detinue*, (*ante*, 492,) claim the restoration of the goods themselves, but only *damages* for a *conversion*: and it has become the usual mode of trying a disputed question of title to goods; see 3 Bla. C. 152; Steph. 3d ed. 18, 19; 1 Chit. Pl. 5th ed. 167; 6th ed. 146; Bac. Ab. Trover; 2 Stark. Ev. 2d ed. "Trover," 832; Harr. Ind. "Trover." This action lies in the case of a conversion of any kind of goods or chattels, or personalty; as deeds or agreements; bills of exchange; trees or earth when severed; or cattle; or the undivided part of a chattel; but it does not lie for the conversion of a *record*, (which is not private property,) or for fixtures, *eo nomine*, not severed from the freehold; *id.*; 1 Chit. Pl. 6th ed. 146 to 148; Minshall *v.* Lloyd, 2 M. & W. 450; Amos, Fix. 242.

In order to maintain trover the plaintiff must prove, if contested by the defendant's pleas,—1st, His property in the goods; 2dly, A conversion by the defendant.

1. *Property* in a chattel is either absolute or special. Either the absolute owner or the special owner, (that is a bailee, carrier, factor, &c.) may sue in trover; with this distinction that the former must sue specially in case for an injury to his *reversion*, (see Form, 3, *ante*, 590,) if the conversion occur whilst a third person has an outstanding special title or interest. In such case the absolute or general owner may sue *as reversioner* for the tort, if it affect his reversionary property, and shall recover damages to the extent of *his* loss; and the special owner may also sue separately for the damage *he* sustains. It is essential in *trover* that the plaintiff should have the *possessory title*, that is, the right to the immediate *possession* of the goods. But the general owner, and (it seems) the special owner, suing in trover, need not show he was in *actual* possession at the time of the conversion; the *right* to possession is sufficient; 2 Saund. 47, notes; 1 Chit. Pl. 6th ed. 148 to 153; 2 Stark. Ev. 832. And the *gratuitous* bailor of goods may sue a wrongdoer, who takes them from the bailee; Nicolls *v.* Bastard, 2 C. M. & R. 659; 1 Tyr. & G. 156; 1 Gale, 295. This action also lies against a *mere wrongdoer* (not deriving any power or authority from the real owner) at the suit of a person who had only the actual possession of the goods at the time of the wrongful taking or conversion; as the finder or gratuitous bailee, or borrower of goods; *id.*

2. The *conversion* is the *gist* of this action; the manner in which the defendant acquired the possession is inducement and immaterial. A conversion does not mean a destruction of the goods, nor does it necessarily import an acquisition of property in the defendant, or a total or absolute deprivation or loss of the goods to the plaintiff. A conversion seems to consist in any tortious act by which the defendant deprives the plaintiff of his goods, either wholly or but for a time; 2 Stark. Ev. 839; 2 Saund. 46, 47, n. A conversion may be either 1st, by wrongfully *taking* goods; 2dly, by some other illegal *assumption of ownership*, or by illegally *using* or *misusing* goods; or 3dly, by a wrongful *detention*; see 1 Chit. Pl. 5th ed. 176; 6th ed. 153, where these grounds of conversion are discussed; 2 Saund. 47, notes; 2

*fore writ,*] †was lawfully possessed as of his own property (*c*) of certain goods and chattels, [*or* "deeds and writings," *or* "bills of exchange," *as the case may be*] to wit, —— (*d*) of great value, to wit, of the value of £——; and being so possessed thereof, he, the plaintiff, afterwards, to wit, on the day and year aforesaid, casually lost the said goods and chattels out of his possession, and the same then came to the possession of defendant by finding: Yet the defendant well knowing the said goods and chattels to be the property of the plaintiff, but contriving and intending to injure the plaintiff in this behalf, hath not as yet delivered the said goods and chattels, or either of them, or any part thereof, to the plaintiff, although often requested so to do; and afterwards, to wit, on the day and year aforesaid, *converted* and disposed of the said goods and chattels to his, the defendant's, own use; To the plaintiff's damage (*e*) of £——, and therefore he brings his suit, &c.

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Star. Ev. 2 ed. 839. What act will amount to a conversion when proved is a question of *law; id.* "The ordinary presumptive proof of a conversion consists in evidence of a demand of the goods by the plaintiff, and a refusal to deliver them by the defendant, who has possession of them. A conversion is, it seems, a *presumption*, which, in point of law, a jury ought to make from such evidence, unexplained by circumstances, but it is a presumption in law and fact, and if the jury simply find the fact of a demand and refusal, the Court cannot infer a conversion. This proof is always necessary where the goods came *lawfully* into the defendant's possession; as by finding, or upon a bailment, or delivery by the owner; but it is unnecessary where a tortious taking of the goods can be proved. Previous to the proof of a demand and refusal, evidence of the possession by the defendant is essential; and proof of a possession by a servant of the defendant is insufficient, unless it be proved that he was his agent for the purpose, or that the agent was employed, and the goods delivered in the course of trade. Thus a delivery to the servant of a pawnbroker in the shop is evidence of a delivery to a pawnbroker;" 2 Stark. Ev. 2d ed. 842, tit. "Trover." The demand and refusal must be absolute and unqualified; Philpot *v.* Kelley, 4 N. & M. 611; 3 Ad. & E. 106; 1 Har. & W. 134, S. C. Refusal on account of the goods having been attached in the defendant's hands by a foreign attachment; Verrell *v.* Robinson, 2 C. M. & R. 495; 1 Gale, 244, S. C.

The plaintiff is entitled to full costs although the damages be under 40*s.*, unless the judge certify to take away costs.

(*b*) See Forms, 2 Chit. Pl. 5th ed. 835; 6th ed. 595; Steph. Pl. 3d ed. 40. Trover by husband and wife; Ayling *v.* Whicher, 1 N. & P. 416.

(*c*) In general the words, "goods of the plaintiff" are a sufficient allegation of title to personalty, Steph. 3d ed. 317; but in trover the above form is usual, and (it seems) necessary; and it is said to have been decided that the omission of the words "as of his proper goods," *or* "of his own property," though cured by verdict, is fatal after a judgment by default; Swallow *v.* Aynclif, 2 Selw. N. P. 1349, n. tit. "Trover, III."; 1 Chit. Pl. 6th ed. 161, note (*r*). Plea traversing this allegation, *post*, *Pleas* in Trover.

(*d*) See the various descriptions of deeds, bills, bank notes, moneys, &c. in the precedents above referred to. A general description of a deed or bill is sufficient; and the date need not be mentioned; Cro. Car. 262; Bac. Ab. Detinue, B. Trover for a bill indorsed to the plaintiff, and evidence in support of the allegation, see 1 Hodg. 102. In an action for an injury to, or for the conversion of, goods, their quantity or number, quality and value, should be stated, as "twenty tables, twenty chairs," &c. but a more particular description of the nature or quality of the goods need not be given; 1 Saund. 333, n. 7; 2 *id.* 74, n. 1; 1 Chit. Pl. 5th ed. 377; Steph. 2d ed. 347; 3d ed. 296, 297. A declaration in trover for "divers goods and chattels," would be substantially bad; *id.*; Pope *v.* Tillman, 7 Taunt. 642; 1 Moor, 386, S. C. And it seems that a declaration for ten "articles of household furniture," or ten "articles of wearing apparel," is also bad on general demurrer; Holmes *v.* Hodgson, 8 Moor, 379. Trover for "a ship with the apparel and appurtenances;" the plaintiff having failed as to the ship, was not allowed to set up a distinct title to a new boat and cordage; Shannon *v.* Owen, 1 M. & R. 392. Trover for "twenty acres of barley," held good, as only designating the quantity of corn; Joyce *v.* Hayman, 1 Alcock & Napier, 22, (Irish.)

(*e*) The damages should be the value of the goods at the time of the conversion;

### †2. *Declaration in Trover by the Assignees of a Bankrupt for a Conversion before the bankruptcy.* (*f*)

*Commencement as ante*, 11, Form 7.] For that whereas the said E. F. before he became a bankrupt, to wit, on [*&c.*] was lawfully possessed as of his own property, of [*&c. see supra*, 664, Form 1,] of great value, to wit, of the value of £——, and being so possessed the said E. F. afterwards and before he became a bankrupt, to wit, on the day and year aforesaid casually lost the said goods and chattels out of his possession, and the same then came to the possession of the defendant by finding; Yet the defendant well knowing the said goods and chattels to be the property of the said E. F. before he became a bankrupt, and of the plaintiffs as assignees as aforesaid after the said bankruptcy, but contriving and intending to injure the said E. F. before he became a bankrupt, and the plaintiffs as assignees as aforesaid since the said bankruptcy in this behalf, hath not, although often requested so to do, as yet delivered to either of them the said goods and chattels, or either of them or any part thereof, but hath hitherto wholly neglected and refused so to do, and the defendant afterwards and *before* the said bankruptcy, to wit, on [*&c.*] converted and disposed thereof to his own use; To the damage of the plaintiffs as assignees as aforesaid, of £——; and therefore they bring their suit, &c.

### 3. *By Assignees of a Bankrupt for a Conversion after the Bankruptcy.*

For that whereas the plaintiffs as assignees as aforesaid, after the said E. F. became a bankrupt, to wit, on [*&c.*] were lawfully possessed of certain goods and chattels, to wit, [*&c.*] of great value, to wit, of the value of £—— [*or if this be used as a second count state*, "of the like number, quantity, quality, description, and value as the said goods and chattels in the said first count mentioned,"] as of the property of the plaintiffs as assignees as aforesaid, and being so possessed thereof the plaintiffs afterwards, to wit, on [*&c.*] last aforesaid, casually lost the said ["last mentioned,"] goods and chattels out of their possession, and the same

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Mercer *v.* Jones, 3 Camp. 477; Davis *v.* Oswell, 7 C. & P. 804; or it seems at any subsequent time, at the discretion of the jury; Greening *v.* Wilkinson, 1 C. & P. 625. The defendant cannot on not guilty prove title in another, to mitigate damages; Finch *v.* Blount, 7 C. & P. 478. If the plaintiff claim special damages, that is, damages not necessarily consequent on the conversion, he should charge them in his declaration; Moon *v.* Raphael, 2 Bing. N. C. 310; Davis *v.* Oswell, 7 C. & P. 804. Damages in trover by assignee of bankrupt against sheriff; Whitehouse *v.* Atkinson, 3 C. & P. 344.

(*f*) 2 Chit. Pl. 5th ed. 837; 6th ed. 597. This form is proper where there was a clear conversion *before* the act of bankruptcy for which the bankrupt might have maintained trover. In most instances the next form is appropriate where there is any doubt whether the conversion was not after the bankruptcy; and the next form as a second count. By the assignees of an insolvent debtor, 2 Chit. Pl. 5th ed. 838; 6th ed. 598.

afterwards, to wit, on [*&c.*] last aforesaid, came to the possession of the defendant by finding; Yet the defendant well knowing the said ["last mentioned"] goods and chattels to be the property of the plaintiffs as such assignees, but contriving and intending to injure the plaintiffs as such assignees, hath not, although often requested so to do, delivered the said ["last mentioned"] goods and chattels, or either of them, or any part thereof, to the plaintiffs, but hath hitherto wholly neglected and refused so to do, and afterwards, to wit, on [*&c.*] last aforesaid, converted and disposed thereof to his own use; To the damage of the plaintiffs as assignees as aforesaid, of £——; and thereupon they bring their suit, &c.

### 4. *Declaration in Trover by Executors for a Conversion in the Testator's lifetime.* (*g*)

*Commencement as ante*, 14, Form 15.] For that whereas the said E. F. in his lifetime, to wit, on [*&c.*] was lawfully possessed of divers goods and chattels, to wit, [*&c.*] of great value, to wit, of the value of £——, as of his own property; and being so possessed thereof the said E. F. in his lifetime afterwards, to wit, on the day and year aforesaid, casually lost the said goods and chattels out of his possession, and the same afterwards and in the lifetime of the said E. F., to wit, on the day and year aforesaid, came to the possession of the defendant by finding; Yet the defendant well knowing the said goods and chattels to be the property of the said E. F. in his lifetime, and of the plaintiff as executor as aforesaid, after the decease of the said E. F., but contriving and intending to injure the said E. F. in his lifetime, and the plaintiff as executor as aforesaid, after the death of the said E. F. did not deliver the said goods and chattels, or either of them, or any part thereof, to the said E. F. in his lifetime, nor hath he delivered the same or any part thereof, to the plaintiff as executor as aforesaid, since the death of the said E. F. although often requested so to do, and the defendant afterwards *and in the lifetime of the said E. F.*, to wit, on [*&c.*] aforesaid, converted and disposed of the said goods and chattels to his own use. [*Add the next form as a second count if it be not clear that the conversion was in the testator's lifetime.*] To the damage [*&c. conclude and add profert as ante* 14, Form 15.

### 5. *By an Executor for a Conversion after the Testator's Death.*

For that whereas also the plaintiff, as executor as aforesaid, afterwards and after the death of the said E. F., to wit, on [*&c.*] was law-

(*g*) 2 Chit. Pl. 5th ed. 838 b, 6th ed. 598; 2 Saund. 47 k, 116. By an administrator; 2 Chit. Pl. 5th ed. 840; 6th ed. 600.

fully possessed of divers goods and chattels, to wit, [*&c.*] of great value, to wit, of the value of £——, [*or, if this be used as a second count, state* "of the like number, quantity, quality, description and value as the said goods and chattels in the said first count mentioned"] as of his property as such executor as aforesaid, and being so possessed thereof, the plaintiff afterwards, to wit, on [*&c.*] last aforesaid, casually lost the said ["last mentioned"] goods and chattels out of his possession, and the same then came to the possession of the defendant by finding; Yet the defendant well knowing the said ["last mentioned"] goods and chattels to be the property of the plaintiff as executor as aforesaid, but contriving and intending to injure the plaintiff as executor as aforesaid, in this behalf, hath not as yet delivered the said ["last mentioned"] goods and chattels or any part thereof to the plaintiff (although often requested so to do) and hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do, and afterwards, to wit, on the day and year aforesaid, converted and disposed of the said ["last mentioned"] goods and chattels to his own use [*conclude to the damage of the plaintiff as executor, and with a profert as ante*, 14, Form 15.

## 6. *Trover against an Executor for a Conversion by the Testator.* (*h*)

*Commencement as ante*, 14, Form 17.] For that whereas the plaintiff *in the lifetime of the said E. F.*, to wit, on [*&c.*] was lawfully possessed [*&c. proceed as in* Form 1 *to the end, using the words* "E. F. in his life," *instead of the word* "defendant," *and in stating the conversion allege* "and within six calendar months before the death of the said" to wit, on [*&c., and after the conversion and before the words* "To the damage" &c. *state* "and the plaintiff further saith, that this action was commenced within six calendar months after the defendant as executor as aforesaid took upon himself the administration of the estate and effects of the said E. F.

(*h*) 3 & 4 W. 4, c. 42, s. 2, Chit. & Hulme, Col. Stat. 22.

# TROVER—PLEAS, &c. :—NOT GUILTY.

## 1. OBSERVATIONS ON THE PLEA OF NOT GUILTY (Forms *ante*, 618,) IN TROVER.

We have before endeavored to explain the object of the New Rules in regard to the operation of the plea of not guilty in an action on the case; and we have seen that *Trover* (which is an action on the case) is thus mentioned by way of example: "In an action for converting the plaintiff's goods, the plea will operate as a denial of the *conversion* only, and not of the *plaintiff's title* to the goods;" *ante*, 614. The plea of not guilty does not therefore deny that the plaintiff has such a property and possession as enables him to maintain the action, *post*, 672, note (*h*); and where the defence is matter of *confession and avoidance*, that is, admits the title and conversion, a special plea is also indispensable.

The case of Stancliffe *v.* Hardwick, 2 C. M. & R. 1; 3 Dowl. 762; 5 Tyr. 551; 1 Gale, 130, decides, *first*, that the defendant, by pleading not guilty singly, admits that the plaintiff has some property in the goods, as between him and the defendant, upon which he would be able to recover against the defendant; but the defendant will not thereby be prevented from proving that he is tenant in common with the plaintiff, and contending that there was no dealing by him with the goods which (in reference to such state of title) constituted a *conversion:* but that where there has been an *actual* conversion, as by seizure and sale, the defendant must, in order to justify such conversion *in fact*, as tenant in common with the plaintiff, plead that fact specially in confession and avoidance:—*secondly*, that the conversion which is put in issue, is not a *wrongful* conversion merely, but a conversion *in fact;* so that if such *actual* conversion is insisted on as lawful, the defendant must confess and avoid it in a special plea, setting forth the title or right by virtue of which he justifies the conversion.

In Stancliffe *v.* Hardwick trover was brought for two horses, and the defence was, that the defendant was partner with the plaintiff. This defence the defendant attempted to give in evidence under the plea of not guilty; but Gurney, B. refused to admit it. Upon a motion for a new trial however the Court of Exchequer were of opinion that the evidence ought to have been received. The judgment of the Court was delivered by Parke, B., and that part of it relating to the admission of evidence to

show the defendant a partner with the plaintiff was as follows: "The plea of *not guilty* is now †equivalent to a plea of not guilty of the conversion, and such a plea undoubtedly admits the plaintiff's property or right of possession. The first question is, what is the extent of that admission? For the plaintiff it was, upon the first argument, insisted, that the sole property or right of possession is admitted to be in the plaintiff, and that it is also admitted that he was entitled to succeed if he proved any act done by the defendant which would be a conversion, if the sole property was in the plaintiff. For the defendant it was insisted, that nothing more was admitted, than that the plaintiff had *some* property or right of possession, as between him and the defendant, and that the defendant was not precluded upon the trial from giving any evidence *to disprove a conversion which was consistent with the admission of such* a property. It was therefore contended, that he had a right to prove that the plaintiff had an *undivided interest only;* and that he himself had a similar *interest as a partner* with the plaintiff, by virtue of which he was authorized to do all that he did, that is, to seize and sell the goods, in order to pay the partnership debts. And we are of opinion, that the defendant is right in this respect, and that he ought not to have been prevented on this ground alone from giving the proposed evidence. If then, the defendant, before the New Rules, instead of pleading the general issue had suffered judgment to go by default, he would have admitted no more than some property and right of possession in the plaintiff, in respect of which he was entitled to recover against the defendant; because the plaintiff would not have been bound to prove more than such an interest, on the general issue, in order to maintain his action. The same would have been the case upon an assessment of damages on a special plea found against the defendant, or decided to be bad on demurrer, and no greater effect can be attributed to the admission on the record, by pleading to the conversion only. It is but in the nature of a judgment by default as to the remainder, and admits the plaintiff's right to recover something against the defendant, if he can prove what the law would deem a conversion by him of the plaintiff's property in the goods in question. Such, and such only, being the effect of the admission, it follows that the defendant may give any evidence in his defence relevant to the issue, and *consistent* with that admission, though he cannot be allowed to go into a case which is contradictory to it. Thus, he could not be permitted to show that the plaintiff was the finder of the goods, and that himself, or some one by whose order he acted, was the real owner, and therefore had a right to dispose of them to his own use, for that would be inconsistent with the admission which he has made, and a denial that the plaintiff had *any* property as against himself. Again, he could not give evidence that the sole property was in another, by whose directions he did the act complained of, for that also is inconsistent with his admission that the plaintiff had some property; but there is no reason why he should not be allowed to prove that another has the same interest as the plaintiff, and †that he lawfully

acted by the authority of that other; or to make any other defence to the action, which is not inconsistent with the admitted fact that the plaintiff has some property in the goods, as between himself and the defendant, for these reasons, we think that the defendant's admission of the plaintiff's property did not preclude him from the defence which he proposed to make."

The next question which arose in the construction of the rule with regard to actions of trover was the effect of the word "conversion." In using this word, the framers of the rule did not add to it the term "wrongful," which accompanied the word "act," in the general rule on pleadings in case. It became a question, therefore, whether "conversion" meant simply the mere act, or whether it meant that act together with its wrongful character, whether the plea of *not guilty* put in issue the act itself only, or all those circumstances which rendered the act wrongful. In this case there was still less foundation for holding the plea to be a denial both of the *fact* and of the *wrong*, than in the case above mentioned of an action on the case for a nuisance, inasmuch as the illustration of the rule referring to the action of trover omitted the term "*wrongful*." Accordingly, in Stancliffe *v.* Hardwick, (before cited) the Court held, that the word did not signify "*wrongful* conversion," but the mere *fact* of conversion, and that under the plea of *not guilty*, the lawfulness or unlawfulness of the act of conversion could not come in question. The following is the portion of the judgment relating to this part of the case. —Roscoe, Tr. 60, 61.

"By the New Rule, the plea of *not guilty*, in actions on the case, operates as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant; and under the head of examples is given the action of trover, in which it is said to operate as a denial of the conversion only. Does this mean a denial of the *fact* of the conversion of the property to the defendant's use only, or a denial of the *wrongful* conversion, that is, of the fact of conversion, and also that such conversion was *tortious?*

"A reference to the context enables us to discover the meaning of this term; it is intended to confine the operation of the plea to a denial of the fact of conversion only, and not to allow the defendant to give evidence of its *legality*, any more than in a plea of *not guilty* to an action on the case for diverting a watercourse, to give evidence that such a diversion was justifiable by license or prescription. The latter point was decided in the case of Frankum *v.* Earl of Falmouth, (*ante*, 615, 616,) and the effect of the New Rules therefore is to alter the previous operation of the plea of *not guilty*, not merely by preventing it from involving a denial of the inducement, as it did before, but also by confining it to a simple denial of the breach, and by excluding all matters in confession and avoidance.

"In all cases, therefore, in which there has been a conversion of the property in question by the defendant, and the defendant insists that

such conversion twas lawful, he ought, since the New Rules, to confess it, and avoid, by pleading specially, the right or title by virtue of which he converted it; as for instance, the leave and license of the plaintiff, or, as in the present case, the authority given by law to one part-owner or tenant in common, to take possession of the joint property, or to one partner to sell it. But a question still remains as to the meaning of the word "conversion." No doubt, however, occurs in this case, for the seizure of the chattel by the defendant, and its subsequent sale is undoubtedly a conversion by the defendant, and he must therefore confess and avoid that conversion by pleading specially the title by which he did it. A doubt may however arise with regard to the proper course to be pursued when the defendant has a *lien* upon the goods, and there has been *only a refusal on demand*, which demand and refusal, it has been well established, is not a conversion in itself, but only evidence of it, and may therefore be explained. The Court are not under the necessity of pronouncing any judgment upon this question at present; but nothing that has been said is to be taken to be an intimation of an opinion, that in such a case where there has been a refusal to deliver on the ground of lien, the right of lien need be specially pleaded."

From the form of expression made use of at the conclusion of the judgment, it would rather seem (observes Mr. Roscoe, (Law. Tr. 63,)) to be the opinion of the Court, that a special plea in the case put would be unnecessary, yet it is submitted, that there are strong reasons for holding the case to come within the operation of the New Rules. *The fact of a demand and refusal* being merely *evidence* of a conversion, (*ante*, 663, n. (*a*)), does not seem to create any material distinction between this and other cases of conversion. Suppose that, in order to support his case, the plaintiff does not prove an actual and direct conversion, but such circumstances only as that a jury may presume, from their having occurred, that a conversion by the defendant did in fact take place. Would this mode of proof make any difference in the pleadings? and what distinction is there between the case put and that of the conversion proved by a demand and refusal? A demand and refusal are nothing more than presumptive proof of a conversion previously committed. Then is the nature of the defence set up by the defendant, *viz.* the right of lien, such as to exonerate him from pleading it specially? That there has been a conversion is proved by the evidence of the demand and refusal. The plea of the general issue, according to the case of Stancliffe *v.* Hardwick, only puts in issue the *fact* of that conversion. The defendant cannot deny or disprove that fact. By what right then, and under what authority, can he give the lien in evidence, under the general issue?

In Clark *v.* Chamberlain, 2 M. & W. 78, which was trover for anchors, and in which, on demand and refusal, the defendant insisted on a lien for salvage (not legally claimable,) Parke, B. said, "If, upon the demand,

instead of insisting upon the salvage being paid, the defendant had said, 'I do not know whether salvage is due or not, and I shall keep them until that has been ascertained,' he would not have been guilty of a conversion, and would have been entitled to a verdict *under the general issue.*" And Alderson, B. observed, "as to the plea of the *general issue*, it might have been a question whether evidence might not have been given *under it* to show that the defendant had a *justifiable ground* for detaining the goods, if he had not insisted upon detaining them for the salvage." As observed by Mr. Tidd, (New Pr. 369,) "As the lien may be considered as matter of title, the safer way seems to be to plead it specially as in the action of *detinue.*" It must still be considered doubtful, not only whether a lien need be specially pleaded; but also whether the special plea is open to a special demurrer, as an argumentative denial of the conversion, in other words, as amounting to the plea of not guilty.

In Vernon *v.* Shipton, 2 M. & W. 9, it was held, that the plaintiff is entitled to a verdict on not guilty, if a conversion be proved, although the evidence show that at the time of the conversion the plaintiff had parted with his property in the goods. Mr. R. V. Richards strongly contended, that to launch his case and identify the goods, and enable the jury to assess the damages, the plaintiff was bound on not guilty to prove some property in himself. Parke, B. "Not guilty admits the property of the plaintiff, and denies the conversion only. It has been held, that a *sale* by a partner is *primâ facie* a conversion as against the other partners, and that his interest in the goods as partner must be pleaded." "The defendant may obtain a particular if he has any difficulty in knowing what goods are claimed." Alderson, B. "This was the case of an *actual* conversion. Now the case of Stancliffe *v.* Hardwick, (*supra,*) established the proposition that if there be a conversion *in fact*, any defence which goes to show that it was not a *wrongful* conversion must be specially pleaded. The case of a conversion by *demand* and *refusal only*, is still open to argument as to the effect of not guilty. Here there was an actual conversion: if that was by the plaintiff's authority, it ought to be so pleaded."

## 2. PLEAS DENYING PLAINTIFF'S TITLE IN TROVER.

### 1. *Plea in Trover denying the Plaintiff's Title to the Goods.* (*a*)

And for a further plea in this behalf, the defendant saith, that the plain-

(*a*) It is clearly necessary to deny the plaintiff's title specially, when disputed, and the plea of not guilty will not put it in issue even to mitigate damages, Finch *v.* Blount, 7 C. & P. 478; or enable the defendant to show that before the conversion, plaintiff had parted with the title; Vernon *v.* Shipton, 2 M. & W. 9. But we have seen that where there has been no actual conversion, the defendant may show on not guilty, that he was tenant in common with the plaintiff, &c. *ante*, 668. It

tiff was not at the said time when, &c. possessed of the said goods and †chattels in the said declaration mentioned, or either of them, or any part thereof, as of his own property, in manner and form as the plaintiff hath above alleged; and of this the defendant puts himself upon the country, &c.

2. *Plea of Property in the Defendant:—namely, that the Tree grew on a close, of which Defendant was seised in fee, wherefore he cut it and delivered it to R. R., who delivered it to Plaintiff, from whom Defendant took it;—giving express color.* (*i*)

And for a further plea in this behalf, the defendant saith, that before

seems that a plea that the goods were not "the property of the plaintiff," concluding to the country, is bad on special demurrer, as an informal traverse of the usual allegation in a declaration in trover, that the plaintiff was "possessed as of his own property:" but will, if issue be joined, be sufficient to raise the question of right of *possession*, as well as the question of right of *property*; see per Parke, B. Samuel *v.* Morris, 6 C. & P. 620. If the plea in the text raises, as it seems to do, the question of possessory right, the defendant might show under it that the plaintiff as owner had let the goods for an unexpired term. The above plea means that the plaintiff has not such an interest as enables him to maintain the action; per Alderson, B. Farrar *v.* Beswick, 1 M. & W. 688; and it appears also that it imports that he has no property as against *the defendant*; see *post*, 676, n. (*n*). It suffices for the plaintiff to prove on the above plea, that he is the general or absolute owner, or the special owner, having in either case the right of possession; or that he the plaintiff, at the time the tort was committed, had the actual possession; such possession being *prima facie* proof of title, and being sufficient against a wrongdoer, *ante*, 663, n. (*a*). The plea raises the question of property *at the time of the conversion*, and suffices whether the defendant derives title from the plaintiff or a third person, the real owner, by sale or otherwise: and under such plea the defendant may show, that before the conversion the plaintiff had parted with the property, or title, or possessory right, and had none left to enable him to sue; Vernon *v.* Shipton, 2 M. & W. 9.

It seems that the above plea of no property in plaintiff, imports that he had *no* title whatever, and that the defendant will fail on the issue, although the plaintiff be only a tenant in common, &c. Where there has been an *actual* conversion, and the defendant justifies as a tenant in common with the plaintiff; (Stancliffe *v.* Hardwick, cited *ante*, 668; per Parke, B. Vernon *v.* Shipton, 2 M. & W. 11;) or under a license from (Kieran *v.* Sandars, 1 N. & P. 625), or an execution against, the plaintiff's co-tenant in common; (Farrar *v.* Beswick, 1 M. & W. 682); it seems that the plea should specially disclose the real and precise state of the title to the goods, &c. and that the general traverse is not sufficient. In many cases it is judicious to narrow the case by pleading title specially, giving color, *infra*, note (*i*), and *supra*, Form, 2. As to pleas denying property, &c. in actions by or against assignees of bankrupt, &c., see *post*, 678 to 688. Where the plaintiff's property is admitted, but a seizure under a judgment and execution, or license, &c. forms the ground of justification, the plea should be special; see *post*, tit. "Sheriffs."

(*i*) This form was held good on demurrer in Morant *v.* Sign, 2 M. & W. 95. The objection (which was overruled) was, that the plea amounted to a denial of the property in the plaintiff, and ought to have been so pleaded, concluding to the country. Alderson, B. "This plea is according to the spirit of the New Rules, as its effect is to bring the point in dispute between the parties to a nearer issue. The defendant says that the trees do not belong to the plaintiff, and he states *why* they do not." And on its being objected that the plea compelled the plaintiff to take issue upon the seisin in fee, Parke, B. said "Is there any thing in the New Rules of pleading to prevent the giving of *color*? This plea appears to me to be in furtherance of the object of the New Rules." "There is no doubt the plea is good." It is an undoubted principle that a plea is bad which denies *argumentatively* the plaintiff's title or property. There must either be a simple denial of the title of the plaintiff, concluding to the country, or if the defendant in his plea specially claim property in himself or another, under whose authority he justifies, some *color* of claim, *express* or implied, must be given to the plaintiff, otherwise the plea will be bad on special

the said time when &c., to wit, on [*&c.*], he, the defendant, was seised in his †demesne as of fee, of and in a certain close called —— [*or*, "abutting," *&c.*] situate in the parish of ——, in the county of ——, and being so seised, he, the defendant, on the day and year last aforesaid, cut down one oak tree then growing and being in and upon the said close, the said tree being the said goods and chattels in the said declaration mentioned; and the defendant further says, that afterwards and before the said time when, &c., to wit, on the day and year last aforesaid, *he delivered the said goods and chattels to one Richard Roe to be kept by the said Richard Roe to and for the use of the defendant, and the said Richard Roe afterwards and before the said* time when &c., to wit, on the day and year last aforesaid, *delivered the said goods and chattels to the plaintiff, whereupon the defendant at the said time when, &c. took the said goods and chattels from and out of the possession of the plaintiff, (k)* as he lawfully might for the cause aforesaid, which is the conversion in the declaration mentioned; and this the defendant is ready to verify.

3. *Plea justifying under the Factors' Act, 6 Geo. 4, c. 94, s. 4, that Defendant bought the Goods of Plaintiff's Agent entrusted therewith, without notice that he had no authority to sell.* (*l*)

And for a further plea in this behalf, the defendant says, that whilst

demurrer; see *id.* 1 Chit. Pl. 6th ed. 528; Steph. 3d ed. 202; Carr *v.* Burdiss, 1 C. M. & R. 782, 787, per Parke, B. cited *post*, 678, note (*p*).

In some cases the real facts themselves give *implied* color, that is, invest the plaintiff with a colorable title. "To an action of trespass for taking the plaintiff's corn, the defendant may plead in confession and avoidance, that he was rector, and that the corn was set out for tithe, and that he took it as such rector. Now it is to be observed, that this is not an absolute confession that he took the *plaintiff's corn* as alleged in the declaration. The defendant asserts on the contrary a title to the corn in himself. But still he admits that the plaintiff was the *original owner and entitled against all the world except the defendant.* There is therefore a confession so far as to admit some *sort of apparent right or color* for the action, and the plea consequently complies with the terms of the rule now under consideration, (*that pleas in confession and avoidance should give color,*) and is sufficient; Leyfield's case, 10 Co. Rep. 88; Reg. Plac. 304. So to an action of trespass for taking the plaintiff's sheep, the defendant may plead in confession and avoidance that J. P. was possessed of them and sold them to him, the defendant, in *market overt*, for though this does not admit the sheep to have been the plaintiff's when the defendant took them as alleged in the declaration, yet it admits them to have been his, *subject to the effect of the sale in market overt*, and therefore gives some color to the plaintiff's claim; Comyns *v.* Boyer, Cro. Eliz. 485 (Fancourt *v.* Bull, 1 Hodges, 122; 1 Bing. N. C. 689.) But if to a similar declaration the defendant were to plead that J. S. was possessed of the sheep as *his own property*, and sold them to him in market overt, the plea would be bad, because it tends to deny that the property was *ever* in the plaintiff and gives *no color* to the claim; Vin. Abr. Color, G.; Doct. Pl. 77." Steph. Pl. 3d ed. 204, 205.

See an instance of a special plea of no title, with an inducement and justification under an execution, *post*, 693, note (*s*). Plea that the *plaintiff bought* the goods on the terms that the purchaser might reseize for the price; Bolton *v.* Sherman, 2 M. & W. 345; *post*, 683, Form 9. See plea of a resale by auction on plaintiff's default as purchaser, &c. 3 Chit. Pl. 6th ed. 946; see further, *post*, tit "Assignees of Bankrupt."

(*k*) The allegations in italics state fictitious facts. This is the usual form of giving color, and is not traversable; see Steph. 3d ed. 212, 214. Indeed if the fiction were traversed, the remainder of the plea, which states matter negativing the plaintiff's claim, would be admitted, and thus the plaintiff would appear on the record to be without title.

(*l*) Chit. jun. Contr. 2d ed. 179, 180.

the plaintiff was the owner of the said goods and chattels in the declaration mentioned, and before the said time when &c., to wit, on [*&c.*], one J. C. was an agent entrusted by the plaintiff with the said goods and chattels within the true intent and meaning of a certain act of parliament passed in the sixth year of the reign of his late majesty King George the Fourth, in †such case made and provided, but was not authorized to sell the said goods and chattels, or either of them; and that whilst the plaintiff was such owner of the said goods and chattels, and whilst the said J. C. was such agent so entrusted as aforesaid, and before the said time when, &c. to wit, on the day and year last aforesaid, the defendant *bona fide* and in the usual and ordinary course of business, and without notice that the said J. C. was not authorized to sell the said goods and chattels contracted with the said J. C. to purchase, and then purchased the said goods and chattels of and from the said J. C., at and for a large sum of money, to wit, £——, and then *bona fide*, without such notice as aforesaid, received the said goods and chattels from the said J. C., and paid him for the same the price thereof, wherefore the defendant did at the said time when, &c. refuse to deliver the said goods and chattels, or either of them, to the plaintiff, on his demanding the same of and from him, the defendant, as the defendant lawfully might, being the conversion in the declaration mentioned; and this the defendant is ready to verify.

### 4. *Plea on* 6 *Geo.* 4, *c.* 94, *s.* 2, *that Defendant received the Goods by way of deposit for an advance, &c. to a Person entrusted by Plaintiff with the Bill of Lading.*(*m*)

And for a further plea in this behalf, the defendant says, that after the 1st day of October, 1826, and before he, the defendant, converted or disposed of the said goods and chattels, or any part thereof, to wit, on [*&c.*], one R. C. was entrusted with and had possession of a certain *bill of lading*, to wit, the bill of lading of and for the said goods and chattels, and in which said bill of lading the same were described and mentioned within the true intent and meaning of a certain act of parliament passed in the sixth year of the reign of his late majesty King George the Fourth, in such case made and provided; and which said bill of lading had theretofore been assigned and indorsed to the plaintiff, and afterwards and before the said R. C. was so entrusted therewith or had possession thereof as aforesaid, had been and was indorsed in blank by the plaintiff; and the said R. C. thereupon, whilst he was so entrusted and so had possession of the said bill of lading so indorsed as aforesaid, to wit, on the day and year last aforesaid, did make and enter into a certain contract or agreement with the defendant for the deposit and disposition of the said goods and chattels; that is to say, for the deposit thereof with the defendant as a security for money to be advanced by him upon the faith

(*m*) Chit. jun. Contr. 2d ed. 179, 180.

of the said bill of lading to the said R. C., and in order that he, the defendant, should and might sell and dispose of the said goods and chattels for and on account of the said R. C., and should and might by and out of the proceeds thereof reimburse himself, the defendant, the amount of the moneys which might be so advanced by him to the said R. C., upon †the faith of the said bill of lading as aforesaid, and should and might account for and pay over the residue of the said proceeds to the said R. C.; and the defendant further saith, that the said bill of lading was thereupon afterwards, to wit, on the day and year last aforesaid, deposited by the said R. C. with the defendant for the purpose, and under the contract or agreement aforesaid; and that he, the defendant, did thereupon, to wit, on the day and year last aforesaid, advance to the said R. C. divers sums of money, amounting together to a large sum of money, to wit, the sum of £——, upon the faith of the said bill of lading, and afterwards, to wit, on the day and year last aforesaid, in further pursuance of the said contract or agreement did sell and dispose of the said goods and chattels for and on account of the said R. C., and by and out of the proceeds thereof did reimburse himself the amount of the said moneys so advanced by him as aforesaid, and then accounted for and paid over to the said R. C. the residue of the said proceeds, which is the same supposed conversion and disposing of the said goods and chattels in the said declaration mentioned; and the defendant further saith, that he, the defendant, had not at the time of the making and entering into the said contract or agreement with the said R. C., or before or at the time when he so advanced the said moneys or any part thereof to the said R. C., as aforesaid, or before or at the time when he so sold and disposed of the said goods and chattels or any part thereof, or before or at the time when he so reimbursed himself and so accounted for and paid over to the said R. C. the residue of the said proceeds, or any part of such proceeds, notice by the said bill of lading or otherwise, that the said R. C., so entrusted as aforesaid, was not the actual and *bona fide* owner or proprietor of the said goods and chattels so described and mentioned in the said bill of lading as aforesaid, or any part thereof; and this the defendant is ready to verify.

### 5. *Plea that the Property in the Goods is in the Defendant, the Plaintiff having obtained them by a fraudulent purchase, &c.*(n)

And for a further plea in this behalf, the defendant says, that heretofore, and before the plaintiff claimed to have any property or interest in

(n) In Howell v. White, 1 Moody & Rob. 400, the defendant pleaded (in trover) that the "plaintiff was not possessed as of his own property of the goods." The plaintiff proved a sale to him from the tenant of a farm held under A. B., under whom the defendant justified, on the ground that the sale was a *fraud* to protect the goods from a distress for rent, wherefore the landlord followed and seized them. And Patteson, J. is reported to have expressed an opinion, that upon the plea as pleaded, the only question was whether the plaintiff *in fact* bought the goods, and that the *fraud* could not be relied upon, it not being specially pleaded.

the said †goods and chattels or any part thereof, and before the said time when, &c. to wit, on [*&c.*] the plaintiff unlawfully did falsely and fraudulently pretend to the defendant, he then being lawfully possessed of the said goods and chattels as of his own property, that the plaintiff was the son of, and then was a partner in trade with, one G. J., and which said G. J. was then known to the defendant to be a person of property and respectability, and that he the plaintiff was a person of property, but was then short of cash, and by means of the said false and fraudulent pretences, and by fraud and covin, the plaintiff did then induce the defendant to agree to sell and deliver the said goods and chattels to him the plaintiff, and then by such false pretences, fraud, and covin obtained the said goods and chattels from the defendant, with intent to defraud him thereof, under color of purchasing the said goods and chattels from him, without then or at any other time paying him the defendant any part of the price or value thereof; whereas in truth and in fact the plaintiff was not then or at any time since a partner in trade with the said G. J.; and whereas in truth the plaintiff was not then a person of property, but was then in very poor and indigent circumstances, [and was then obtaining his living by unlawfully obtaining the goods and chattels of other persons from such persons by false pretences;] wherefore the defendant, within a reasonable time in that behalf, after he discovered the said fraud, to wit, at the said time when, &c. seized and took the said goods and chattels, as and then being respectively the goods and chattels and property of the defendant, from and out of the plaintiff's possession, and converted and disposed of the same to his the defendant's own use, being the said conversion in the declaration mentioned; (*o*) and this the defendant is ready to verify.

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However, in Nicolls *v.* Bastard, 2 C. M. & R. 659; 1 Gale, 295; 1 Tyr. & G. 159, S. C., where in trover against the sheriff the defendant pleaded 2dly, *No property in plaintiff*, and 3dly, That J. H. was possessed and fraudulently sold to plaintiff to defeat an execution on a judgment, Parke, B. said, "The whole defence stated in the last plea *would in truth have been admissible under the 2nd; the plea of no property in the plaintiff means no property as against the defendant, which the plaintiff* could not have if the sale were fraudulent." And in Becke *v.* Smith, 2 M. & W. 191, the questions of *fraudulent* assignment to the plaintiff to defeat an execution, in contemplation of a petition for a discharge under the Insolvent Debtors' Act, appear to have been discussed and decided upon the simple plea of no property. In Canuan *v.* Wood, 2 M. & W. 456, (trover by theassignee of a bankrupt) upon a plea that the goods were not the property of the bankrupt, the question whether a delivery of goods *bonâ fide* made in payment of a previous debt, after a secret act of bankruptcy committed by the debtor, is a payment protected by the 82d section of the Bankrupt Act, was determined. A plea that plaintiff *in fact* bought the goods, but showing fraud, appears to give sufficient implied color to be good as a special plea of title; see *ante*, 673, note (*i*); see a Form in Trespass, 3 Chit. Pl. 6th ed. 1003.

(*o*) *Or the plea might conclude*, "without this, that the plaintiff was lawfully possessed of the said goods and chattels, or any part thereof, as of his own property, as in the said declaration alleged; and of this the defendant puts himself upon the country, &c."

### 6. *Plea that the Plaintiff and another Person were Tenants in Common of the Goods, and that Defendant converted them by the leave of the Third Party.*

[See Form Kieran *v.* Sanders, 1 N. & P. 625, 626, E. T. 1837; and as to this plea, see further cases cited, *ante*, 668, 673, note (*h*); see also Form, 3 Chit. Pl. 6th ed. 941.]

## ASSIGNEES OF A BANKRUPT.

### 1. *Pleas denying the validity of the Fiat, and the Plaintiffs' Character of Assignees.*

[In trover by assignees of a bankrupt, neither the plea of not guilty, nor a plea denying the plaintiffs' property as assignees in the goods, will put in issue the trading; act of bankruptcy; petitioning creditor's debt; *fiat* and proceedings; or the plaintiffs' character of assignees; see *ante*, 226; Jones *v.* Brown, 1 Bing. N. C. 484. See the pleas denying these respective matters specially, and replication thereto, Forms 1 to 8, *ante*, 228 to 231; Form of *Notice* to dispute bankruptcy, &c. and *Evidence*, *ante*, 226 to 228, 2 & 3 Will. 4, c. 114. Notice to dispute is necessary under 6 Geo. 4, c. 16, s. 90, with the pleas, although the pleas show the objection; Moon *v.* Raphael, 7 C. & P. 115.]

### 2. *Denial of Plaintiffs' Title as Assignees.* (*p*)

And for a further plea in this behalf, the defendant saith, that the plain-

(*p*) See Form, Scott *v.* Thomas, 6 C. & P. 611, note (*a*). In denying the title to the goods, take care to examine the declaration, in reference to the form in which the property in the goods is claimed therein. If it charge that the *bankrupt* was possessed, &c. before his bankruptcy, of course the plea must be framed accordingly. In Carr *v.* Burdiss, 1 C. M. & R. 782; 5 Tyr. 136, the first count laid the property in the bankrupt, the second count stated the property to be in the assignees. The fourth plea went to the whole declaration, and claimed the property by virtue of an assignment from the bankrupt before the bankruptcy; and Parke, B. said, "the plea is undoubtedly bad as amounting to the general issue; it ought to have been a traverse of the property. It would have been bad on demurrer."

The observations made on the effect of the plea of not guilty, *ante*, 668 to 672, and the plea of no property, *ante*, 672, n. (*h*); apply in general to pleas in actions of trover, by and against assignees of a bankrupt. In trover by assignees to recover goods claimed by them as having been fraudulently assigned by the bankrupt before his bankruptcy, if the defendant rely upon the validity of the transfer to him, he may dispute the title by a simple denial of the allegation, that the bankrupt, or the plaintiff as assignee, (as the case may be) was possessed of the goods as of his property, &c.; see instances and cases, *ante*, 676, note (*n*). It is, however, often judicious to plead the defendant's title specially as in the following forms. Where the title and conversion are admitted, but the defendant *justifies* the latter, he must of course plead specially. In trespass or trover by a bankrupt against his assignees to try the validity of the fiat, and charging an entry into premises, or the taking, or conversion of goods, the defendant may try the question of validity under the general

tiffs were not at the said time when, &c. possessed of the said goods and chattels in the said declaration mentioned, or either of them, or any part thereof, as of their property as assignees as aforesaid, in manner and form as the plaintiffs have above alleged; and of this the defendant puts himself upon the country, &c.

†3. *Plea by Assignees sued in Trover, claiming the Goods as their Property under a Fiat, &c. against a Third Person—giving the Plaintiff color.* (*q*)

4. *Plea, in Trover, brought by the Assignees of a Bankrupt, for a Ship, that the Bankrupt mortgaged it to the Defendant with power of Sale, who seized and sold it—giving color.* (*r*)

And for a further plea in this behalf, the defendants say that before and at the time of making the indenture hereinafter next mentioned and before the said J. D. became a bankrupt as in the declaration alleged, the said ship [*&c.*] were the property of the said J. D., and he was then the sole owner and lawfully possessed thereof as of his own property; and they further say, that whilst the said ship [*&c.*] so were the property of the said J. D., and whilst he was so lawfully possessed thereof as of his own property, and before he became a bankrupt as in the declaration alleged, and before the said time when &c., to wit, on [*&c.*], by a certain indenture then made between the said J. D. of the one part and the defendants of the other part, one part of which said indenture, sealed with the seal of the said J. D., the defendants now bring here into Court, the date whereof is the day and year last aforesaid, after reciting to the effect following, to wit, that the said J. D. was the sole owner and proprietor of the said ship [*&c.*], and that the said ship had been duly registered pursuant to the act of parliament, and also the reciting the certificate of

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traverse, that the premises or goods were the plaintiff's property. And no advantage of any moment can be gained by pleading the bankruptcy and proceedings specially (even if a plea could be framed, so far giving color as to obviate a demurrer to it, for amounting to the general traverse.) For, to a plea justifying specially under a fiat or messenger's warrant, and stating the trading, petitioning creditor's debt, and act of bankruptcy, &c. the general replication *de injuriâ* (after admitting the *fiat* as matter of record) would be sufficient, and would put the defendant on proof of the trading, petitioning creditor's debt, act of bankruptcy, and proceedings stated, except the fiat; see O'Brien *v.* Saxon, 2 B. & C. 908; Jones *v.* Brown, 1 Hodges, 35, 36, per Tindal, C. J., 1 Bing. N. C. 484, S. C.

(*q*) See forms, &c. Jones *v.* Brown, 1 Bing. N. C. 484. The plaintiff replied merely that the goods belonged to him and not to the defendant; and it was held that upon this issue it was not incumbent on the defendants, the assignees, to give formal proof of the bankruptcy and their appointment as assignees. In general the plea of no property would suffice; *ante*, 672, note (*h*).

(*r*) The declaration in the case in which the above was pleaded, laid the property in the assignees and a conversion after the bankruptcy. The pleas allowed by the Judge were, 1st, Not guilty; 2dly, Traverse of plaintiffs' property as assignees; 3dly, That the bankrupt was not nor is a bankrupt according to the statutes, *modo*, &c.; and 4thly, the above plea in the text.

the registry of the said ship; and further reciting that the said J. D. was and stood justly and truly indebted to the defendants in the sum of £—— and upwards, which being then unable to pay he had agreed, in order to secure the same and any further moneys which might at any time thereafter be due from him with interest, to make an assignment to them of, amongst other things, the said ship, upon the trusts thereinafter mentioned, in pursuance of the said agreement; and in consideration of the said sum of £—— and upwards so due and owing as aforesaid, and another consideration therein mentioned, the said J. D. granted, bargained and sold unto the defendants the said ship [*&c.*], and all the right, title, interest, trust, possession, property, claim and demand whatsoever, both at law and in equity, of him the said J. D. of, in and to the said ship [*&c.*]; to have and to hold the same unto and by the defendants, their executors [*&c.*], absolutely to and for their own proper use and benefit, subject nevertheless to a certain proviso or †condition for redemption of the said ship [*&c.*] if the said J. D., his executors [*&c.*] or any of them, should and did, upon demand or notice in writing from the defendants, well and truly pay or cause to be paid unto the defendants [*&c.*] all such sum and sums of money, with interest for the same after the rate of £—— per centum per annum, from the time or respective times of advancing the same to the day or days of payment, as the said J. D. then did, or should or might at any time or times thereafter stand indebted in, or owe unto the defendants for or by reason or means of any moneys then due and owing, or thereafter to be advanced or paid by the said defendants [*&c.*], to or for the use or on account of the said J. D. [*&c.*]; and it was by the said indenture expressly declared and agreed, by and between the said parties thereto, that if the said J. D. should not, upon such demand or notice as aforesaid, well and truly pay unto the defendants all such principal moneys and interest as should or might be due to them as aforesaid and every part thereof, then and in such case it should and might be lawful to and for the defendants, at any time or times thereafter, to enter either peaceably or forcibly, if requisite, into, and keep possession of the said ship [*&c.*], and to receive and take the earnings, freights and profits thereof to their and his own use and benefit, and whether in or out of possession thereof either to mortgage or absolutely to sell and dispose of the same to any person or persons whomsoever, for so much money as could be reasonably obtained, with full power to pay off any moneys which might be borrowed on mortgage thereof, or to buy in the said ship, barge, or vessel, or any of the things thereto belonging at any auction thereof, and afterwards to re-mortgage or resell the same to any person or persons without being answerable for any loss to be occasioned thereby, and to execute the bill or bills of sale or assurances to the purchaser or purchasers, or mortgagee or mortgagees of the same, and which indenture was afterwards and before the said J. D. became a bankrupt, and in the life time of the said J. D., to wit, on [*&c.*], produced to the collector and comptroller of the said port of ——, being the port at which the

said ship was then last registered as expressed and stated in the said certificate of registry recited in the said indenture; and the said collector and comptroller afterwards and before the said J. D. became a bankrupt and before the said times, when &c., to wit, on [*&c.*] entered in the book of such last-mentioned registry the last mentioned indenture, together with the names, residences and description of the said J. D. the said mortgagor of the said ship, and the names, residences and descriptions of the defendants as the mortgagees thereof, with such power of sale as aforesaid, and the said collector or comptroller then indorsed the aforesaid particulars of such indenture with certificate of the registry of the said ship, pursuant to the statute in such case made and provided, and all necessary and proper indorsements required by the statute in such case made and provided were indorsed on the said certificate of registry of the said ship, pursuant to the statute in such case made and provided; and the defendants further say that the said J. D. was and remained indebted to them in the said sum of £—— in the said indenture mentioned, and in another large sum of money, to wit, of £—— for interest thereon, before and at the time he became a bankrupt, and at the time of giving the notice and making the demand hereinafter mentioned, and until and at the time of the sale hereinafter next mentioned; and the said J. D. so being and continuing indebted to the defendants in the said sum of £—— and interest thereon, they the defendants afterwards and before the said time when &c., to wit, on [*&c.*], signed and gave a notice in writing to the said J. D., and thereby demanded payment of and by the said J. D. of the said principal money and interest secured by the said indenture, to wit, the said sum of £—— with all interest for the same at the rate aforesaid; but the said J. D. did not upon such notice or demand, or at any time before or since hitherto well and truly, or in any manner pay or cause to be paid to the defendants or to either of them the said sum of £—— or any part thereof, with interest for the same or any part thereof, but wholly neglected, omitted and refused so to do and therein failed and made default; by reason of which premises, and under and by virtue of the power and authority given to them the defendants by the said indenture, the defendants before the said time, when &c., became and were entitled to take, and afterwards and after such default of and by the said J. D. as aforesaid and before the said time, when &c., to wit, on [*&c.*], did take possession of the said ship [*&c.*], for the purpose of selling, and with intent to sell the same and to apply the proceeds thereof in and towards payment and satisfaction of the said principal money and interest so due to them the defendants as aforesaid; and afterwards and before the said time, when &c., to wit, on the day and year last aforesaid, delivered (*s*) the same to one Richard Roe, to be by him kept to and for the use of them the defendants until a proper and convenient time for the sale thereof by them the defendants for the purpose aforesaid; and they

(*s*) This is the form of giving express color, *ante*, 674, and *id.* note (*k*).

further say that the said R. R. afterwards and before the said time, when &c., to wit, on the day and year last aforesaid, delivered the said ship [*&c.*] to the plaintiffs, whereupon the defendants afterwards and in the life time of the said T. S., to wit, at the said time when &c., took the said ship [*&c.*] from and out of the possession of the plaintiffs, and afterwards, to wit, on the day and year last aforesaid, under and by virtue of the said indenture and the power and authority to them thereby given, sold and disposed of the same at and for the best price that could be had or gotten for the same, and applied the proceeds thereof towards payment and discharge of the said sum of £—— and the interest thereon as they lawfully might for the cause aforesaid; and which said seizure and sale of the said ship [*&c.*], in manner and for the cause aforesaid are the supposed conversion in the declaration mentioned, and whereof the plaintiffs have above thereof complained against them the defendants; and this the defendants are ready to verify, &c.

5. *Plea (in Trover by the Assignees of a Bankrupt for a Bill of Exchange, laying that the Bill was the Bankrupt's property, and charging a Conversion after the Bankruptcy,) that the Bankrupt indorsed the Bill to the Defendant for a Debt before the Bankruptcy.* (*t*)

1*st*, *Not guilty*: 2*dly*, *Denial of Bankrupt's Property.*] 3dly, And for a further plea in this behalf the defendant saith, that heretofore and before the said W. G. became a bankrupt, to wit, on [*&c.*] the said W. G. was justly indebted to the defendant in a certain sum of money, to wit, the sum of £——, for [money before that time lent and advanced by the defendant to the said W. G., and at his request]; and the said W. G. being so indebted he, the said W. G., afterwards and before he became a bankrupt, to wit, on [*&c.*] last aforesaid, at the request and upon the application of the defendant made to him for the payment of the said sum of money, indorsed and delivered the said bill of exchange in the said declaration mentioned, to the defendant for and on account of the said sum of money so due and owing from him to the defendant as aforesaid; and the defendant then accepted and received the said bill of exchange of and from the said W. G. before he became a bankrupt, for and on account of his said debt, and then became and was the lawful holder of the said bill of exchange, and entitled thereto, and continued such holder thereof until and at the time of the said supposed conversion thereof: wherefore the defendant at the said time, when &c. refused to deliver the said bill to the plaintiffs as assignees as aforesaid upon their then demanding the same of him, being the supposed conversion in the declaration mentioned; and this the defendant is ready to verify, &c.

(*t*) *Semble*, if the plaintiff declared upon his property *as assignee*, the simple plea of traverse, *ante*, 678, *id.* n. (*p*), would be sufficient and proper, see Carr *v.* Burdiss, 1 C. M. & R. 782, 787; *ante*, 676, note (*n*). See *post*, 689.

6. *Replication thereto, that the Bill was delivered as a Fraudulent Preference.* (*u*)

And the plaintiffs as to the plea of the said defendant by him thirdly above pleaded say, that the said W. G. at the said time in that plea in that behalf mentioned, voluntarily and in contemplation of *bankruptcy*, and with the object and intention of giving a preference and advantage to the defendant beyond his other creditors, indorsed and delivered the said bill of exchange to the defendant; and this the plaintiffs are ready to verify, &c.

†7. *Rejoinder thereto, denying Fraud.*

And the defendant as to the said replication of the plaintiffs to the said third plea of him the defendant, saith, that the said W. G. did not indorse or deliver the said bill of exchange to him the defendant voluntarily and in contemplation of bankruptcy, or with the object or intention of giving a preference or advantage to the defendant beyond his other creditors, in manner and form as the plaintiffs have above alleged; and of this the defendant puts himself upon the country, &c.

8. *Plea in an Action by Assignees of a Bankrupt, laying Possession in them, that the Defendant sold the Goods to the Bankrupt, claiming a Lien for the price.* (*x*)

9. *Plea that the Goods were sold by Defendant to the Bankrupt on the terms that Defendant might retake them, if the price were not paid, justifying the retaking on that ground.* (*y*)

10. *Plea of Lien under a deposit for a Debt due from the Bankrupt; and for Work done for him.* (*z*)

11. *In Trover by Assignees of a Bankrupt claiming the Goods as their Property, a Plea of Stoppage in transitu on behalf of the Vendor of the Goods.* (*a*)

And for a further plea in this behalf the defendants say, that J. S. being

(*u*) Atkinson *v.* Brindall, 2 Bing. N. C. 225; 2 Scott, 369; Morgan *v.* Brundrett, 2 N. & M. 280; 5 B. & Ad. 229.

(*x*) See form, &c. Townley *v.* Crump, 4 Ad. & E. 58; see Miles *v.* Gorton, 2 C. & M. 504, 511; 4 Tyr. & G. 295, S. C.; Tansley *v.* Turner, 2 Bing. N. C. 151.

(*y*) See form, &c. Bolton *v.* Sherman, 2 M. & W. 395.

(*z*) See forms Marks *v.* Lahee, 3 Bing. N. C. 408; 4 Scott, 137, S. C.; and Form 5, *post*, 696.

(*a*) See in general Whitaker on Lien, &c.; Selw. N. P. tit. "Stoppage in Tran-

14. *Plea in Trover by Assignees, charging a Conversion after the Bankruptcy, claiming a Lien for Work done before and after the Bankruptcy.*(c)

And for a further plea in this behalf, the defendant saith, that before the said D. H. became a bankrupt, to wit, on [*&c.*], he was lawfully possessed as of his own property of certain wool and materials, whereof the said cloth in †the said declaration mentioned was and is composed, and being so possessed then delivered the said wool and materials to the defendant, he then and thence hitherto carrying on the business of a manufacturer of cloth, for the purpose and in order that the defendant might in the way of his said business by and with the said wool and materials manufacture the said cloth in the declaration mentioned, for reward to the defendant in that behalf; and the defendant further saith, that afterwards and before the said D. H. became a bankrupt, to wit, on the day and year last aforesaid, he, the defendant, did accordingly in the way of his said business in part manufacture the said cloth by and with the said wool and other materials upon the terms aforesaid, and that after the said bankruptcy, to wit, on [*&c.*], the plaintiff, as assignees as aforesaid, requested the defendant in the way of his said business to finish and complete the manufacture of the said cloth upon the terms aforesaid; and thereupon the defendant before the said time when &c. to wit, on the day and year last aforesaid, in the way of his said business did finish and complete the manufacture of the said cloth by and with the said wool and materials upon the terms aforesaid; and the defendant further saith, that the reasonable reward payable and to be paid to the defendant for manufacturing the said cloth on the said several occasions as aforesaid, amounted to a certain sum, to wit, £10, part whereof, to wit, £——, was for the said work done before the said bankruptcy, and the residue thereof for the said work done after the said bankruptcy, but neither the said D. H. before his said bankruptcy nor the plaintiffs since the said bankruptcy, paid to the defendant the said sum of £10, or any part thereof, and before and at the said time when &c. the same was due, in arrear and unsatisfied to the defendant, wherefore the defendant hath continually held the said cloth as such lien as aforesaid, and at the said time when &c. having by reason of the premises a lien on the said cloth in the said declaration mentioned, for the said sum of £——, refused to deliver to the plaintiffs the said cloth upon their then, as assignees as aforesaid, demanding of him the said cloth, unless the plaintiffs would

(c) As to pleas of lien in general, see Forms, &c., *post*, 691 to 698. These may readily be adapted to pleas of lien in case of bankruptcy. See plea of *general* lien as an insurance broker in trover by assignees, and replication that a bill not due was taken for the debt, Hewison *v.* Guthrie, 2 Bing. N. C. 755; 3 Scott, 298, S. C. Where the claim to hold the goods is not founded on a lien for a *debt*, but depends on *mutual credit* between the parties at the time of the bankruptcy, justifying the detention, the plea must be specially framed accordingly; *id.*; see *ante*, 391, Form 5.

pay to the defendant the said sum of money so due to him as aforesaid, as he lawfully might for the cause aforesaid, being the said supposed conversion in the declaration mentioned; and this the defendant is ready to verify, &c.

15. *Replication, that the Plaintiffs, as Assignees, tendered the amount of Lien.* (*See* Form, *post*, 697.)

And as to the plea of the defendant by him lastly above pleaded, the plaintiffs say, that although true it is, that the defendant, before the said time when, &c. had a lien on the said cloth in the said declaration mentioned, for certain reasonable reward payable to the defendant for manufacturing the same for the said D. H. before he became bankrupt and for the plaintiffs, as assignees as aforesaid, since the said bankruptcy; for replication nevertheless in this behalf, the plaintiffs say, that heretofore and before the commencement of this suit, to wit, at the said time when &c. they, the plaintiffs, were ready and willing and then tendered and offered to pay to the defendant the sum of £——, being the amount of his said lien, for manufacturing such cloth, and then demanded the said cloth of the defendant, but the defendant then wholly refused to accept or receive the amount of the said lien or to deliver the said cloth or any part thereof to the plaintiffs, and then, on the contrary thereof, the defendant wrongfully insisted on retaining the said cloth, not only in respect of the said lien, but in respect of a certain other sum of money then alleged by the defendant to be due and owing to him from the said D. H. at the time he became bankrupt, and the defendant did then wrongfully retain the said cloth accordingly, which is the conversion in the declaration mentioned; and this the plaintiffs are ready to verify, &c.

16. *Plea to a Declaration by the Assignees of a Bankrupt, charging a Conversion after the Bankruptcy, that the Defendant redelivered the Goods to the Bankrupt before the fiat and without notice of an act of Bankruptcy.* (*d*)

And for a further plea in this behalf, the defendant says, that before the said E. F. committed an act of bankruptcy, and before the issuing of the fiat in bankruptcy under which the plaintiffs became assignees as aforesaid, to wit, on [*&c.*], he, the said E. F., delivered to the defendant and deposited and left with him the said goods and chattels in the declaration mentioned, then being the goods and chattels of the said E. F.,

(*d*) By the Bankrupt Act, 6 Geo. 4, c. 16, s. 84, no person having in his possession or custody any goods belonging to the bankrupt shall be endangered by reason of the delivery thereof to him or his order, provided such person had not, at the time of such delivery, notice that such bankrupt had committed an act of bankruptcy.

and belonging to him, to be kept and taken care of by the defendant for the said E. F.; and the defendant further saith, that after the said E. F. committed an act of bankruptcy, to wit, the act of bankruptcy whereon the said fiat was issued, and before the issuing of the said fiat, to wit, on [*&c.*], he, the defendant, redelivered the said goods and chattels in the declaration mentioned, (the same then being and remaining in the hands and possession of the defendant by virtue of the said deposit), to the said E. F. at his request; and the defendant further says, that he had not before or at the time of such redelivery of the said goods and chattels to the said E. F. as aforesaid, notice that the said E. F. had committed any act of bankruptcy; which said redelivery of the said goods and chattels to the said E. F. is the said supposed conversion by the defendant in the declaration mentioned, and whereof the plaintiffs, as assignees as aforesaid, have above complained against him; and this the defendant is ready to verify, &c.

†17. *Plea in Trover against the Assignees of a Bankrupt, that the Goods were in the Bankrupt's possession as reputed owner.* (*e*)

*State the trading, petitioning creditor's debt, bankruptcy, fiat, and adjudication, &c. and appointment of assignees, and confirmation thereof, and end with the reference to the memoranda of choice and appointment, according to* Form 5, *ante*, 250 *to* 252.] And the defendants further say, that heretofore and before the committing of the grievances in the declaration mentioned, and before and at the time the said J. G. became such bankrupt as aforesaid, the plaintiff was the true owner of the said goods and chattels in the declaration mentioned; (*f*) and that the said J. G. before the committing of the grievances in the declaration mentioned, and before and at the time he became a bankrupt as aforesaid, by the consent and permission of the plaintiff, so being the true owner thereof as aforesaid, had in his possession, (*g*) order and disposition all and singular the said goods and chattels in the said declaration mentioned, and then and during all that time was the reputed owner thereof; (*h*) and the defendant further saith, that afterwards and after the said J. G. became such bankrupt as aforesaid, and after the defendant E. F. was chosen assignee as aforesaid, and accepted the said trust as aforesaid, and after the said choice was so confirmed and certified as aforesaid, to wit, on [*&c.*], they, the said defendants, claimed to be and became and were entitled to the said goods

(*e*) See Bankrupt Act, 6 Geo. 4, c. 16, s. 72; see Carr *v.* Burdiss, 1 C. M. & R. 782, 788; Arch. Bank. Law, 6th ed. 180.

(*f*) This gives color.

(*g*) The words of the act are, "That if any bankrupt at the time he becomes bankrupt shall by the consent and permission of the true owner thereof, have in his possession, order *or* disposition any goods or chattels whereof he was *reputed owner*, *or* whereof he had taken upon him the sale, alteration or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission."

(*h*) If the action be for a *ship*, negative the proviso in 6 Geo. 4, c. 16, s. 72.

and chattels, as such assignees as aforesaid, for the benefit of the creditors under the said fiat; and thereupon they, the said defendants, as such assignees as aforesaid, to wit, on [*&c.*], kept and retained possession of the said goods and chattels and refused to deliver the same to the plaintiff on demand by the plaintiff then made for that purpose, and converted the same to the use of them, the defendants, as assignees as aforesaid, which are the same supposed grievances in the declaration mentioned, and whereof the plaintiff hath above thereof complained; and this the defendants are ready to verify, &c.

18. *In Trover by Assignees, Plea justifying under a fieri facias against the Bankrupt; and Replication that Judgment was by Cognovit and the Action collusive, &c.* (*i*)

†19. *Plea of Payment of Money or Damages into Court in Trover by the Assignees of a Bankrupt.* (*j*)

## BAILEES.

[Plea, by the bailee of a bill to get it discounted, that he did so according to the authority given; Palmer *v.* Jarmain, 2 M. & W. 282. A bailee claiming and having a special title or possessory interest in the goods, may defend if sued by the general or reversionary owner, or a stranger, upon the common plea traversing the property in the plaintiff; or may defend against the owner in reversion, or bailor, upon a special plea of the bailment.]

## BILLS OF EXCHANGE.

### 1. *Pleas in Trover for.*

[In trover for a bill, pleas that the defendant took the bill from a third person for a debt, &c., and replication thereto; Fancourt *v.* Bull, 1 Bing. N. C. 681; 1 Scott, 641; 1 Hodg. 98, S. C. In that case the form of a plea setting up title to a bill in the defendant, is fully considered and explained by Tindal, C. J. in delivering the judgment of the Court. The plea must give the plaintiff color, and must show, not merely an indorse-

(*i*) See forms, Scott, assignee, *v.* Lewis, 7 C. & P. 347; *post*, tit. "Sheriff."

(*j*) Form of plea and replication, Clark *v.* Nicholson, 6 C. & P. 712, note (*a*). The form, *ante*, 369, will apply, describing the plaintiffs "as assignees as aforesaid."

ment to defendant, but also that it was for value and without notice of any defect in a prior party's title, &c.

Plea that the defendant received a bill from a third person as his agent to deliver it to the plaintiff, but that defendant's principal countermanded the authority, and pleadings thereon; Brind *v.* Hampshire, 1 M. & W. 365; 1 Tyr. & Gr. 790, S. C.

Plea that the plaintiff delivered the bill to defendant as his agent, to get it discounted, which the defendant did; Palmer *v.* Jarmain, 2 M. & W. 282.

Plea, &c. in trover by assignees of a bankrupt for a bill; *ante*, 682.

Where the plaintiff has been divested of his *property* in the bill before the conversion, the common plea of no property (*ante*, 673, note (*h*),) suffices.]

2. *Plea, in Trover for a Bill, that the Defendant took it bonâ fide from a Person to whom the Plaintiff had delivered it as a security for a Debt due to Defendant with the option of discounting the Bill.*

And for a further plea in this behalf, the defendant saith that before the time of the said supposed conversion of the said bill, the plaintiff, who was the drawer thereof and to whose order the same was payable as aforesaid, was lawfully possessed of the same as of his own property, and being so possessed thereof the plaintiff before and at the said time, when, &c., to wit, on [*&c.*], indorsed the same in blank, and then delivered the same so indorsed to another person, to wit, one E. F. and the said bill so indorsed as aforesaid was, before and at the time of the delivery thereof to the defendant as hereinafter mentioned, in the hands and possession of the said E. F., and he was the holder of the said bill; and the said E. F. being such holder of the said bill of exchange, before and at the time of the delivery thereof to the defendant as hereinafter mentioned, was indebted to the defendant in a large sum of money, to wit, the sum of £—— for goods sold and delivered by the defendant to the said E. F. at his request; and thereupon heretofore and before the said bill became due according to the tenor and effect thereof, and before the said time, when &c., to wit, on [*&c.*] the said E. F. being such holder thereof, and being indebted to the defendant as aforesaid, indorsed the said bill and delivered the same so indorsed as aforesaid to the defendant, and the defendant then received the same from the said E. F. *bona fide* and without notice that the said E. F. had not full right and title to the said bill, or that the plaintiff was entitled thereto, and upon a good and sufficient consideration, to wit, upon the terms that the defendant should hold the said bill as a security for and on account of his said debt until the said bill should become due according to the tenor and effect thereof, and should, when the said bill should become due and payable, present

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the same for payment, and in case the same should be paid should retain out of the amount thereof the said sum of £——, so due and owing from the said E. F. to the defendant as aforesaid, and pay the residue of the proceeds of the said bill to the said E. F., or else that the defendant should at his election at once discount, or cause to be discounted the said bill, and after retaining such debt so due to him, pay to him the said E. F. the residue of the proceeds thereof, less the amount of legal interest on the amount of the said bill for the time the same had to run; and the defendant further saith that the said bill had not become due, according to the tenor and effect thereof, when this action was commenced, and that he hath elected to hold and still holds the said bill of exchange for the purpose and upon the terms herein first mentioned, to wit, as a security for and on account of his said debt upon the said terms in that behalf, and at the said time, when &c., refused to deliver the said bill to the plaintiff, being the same supposed conversion of the said bill whereof the plaintiff hath above thereof complained against the defendant; and this the defendant is ready to verify, &c.

## †DISTRESS FOR RENT (*k*).

## EXECUTION. [*See* "SHERIFF."

## FRAUD. (*l*)

## LIEN AND PLEDGE. (*m*)

(*k*) See *ante*, 625, note (*t*), and *post*, "*Trespass*—Pleas in—Distress."

(*l*) See *ante*, 631. Observations and forms, 676.

(*m*) We have seen that it is still undecided whether in trover the detention of the goods, as a *lien* for a debt, may be given in evidence under not guilty, or must be specially pleaded, *ante*, 672. The latter course is customary. Where a particular lien arises in respect of *several chattels* delivered to the defendant, under *distinct contracts* for work to be done in respect of *each* article, it seems there must be a *separate plea* of lien in reference to *each* chattel; and that if the defendant in a plea, claim a lien for the total of the debts due to him in respect of the various goods, the plaintiff may successfully reply that the defendant was retained and did work under the separate and distinct contracts; for the claim is properly to separate liens, not one lien for the whole amount; Marks *v.* Lahee, 3 Bing. N. C. 408; 4 Scott, 137, S. C. In an action of trover for wool, the Court allowed defendant to plead, "1st, The general issue; 2d, a lien by custom; 3d, a lien by agreement; 4th, a lien by custom, with a statement that the wool was deposited by one having a *prima facie* title to it; and 5th, a lien by custom, with a statement that the wool was deposited with the defendant by the plaintiff's agent;" Leuckhart *v.* Cooper, 1 Sc. 481; 1 Bing. N. C. 509; 1 Hodg. 16; 7 C. & P. 119. Lien against *Assignees*; *ante*, 685.

### 1. *Plea of Lien by a Tradesman for Work done in respect of the Goods.* (*n*)

And for a further plea in this behalf, the defendant saith, that the said goods and chattels in the said declaration mentioned, were, before the said time when, &c. to wit, on [*&c.*] delivered by the plaintiff to the defendant, to be by him the defendant, in the way of his business of a —— *repaired* [*as the case may be,*] for the plaintiff for reward to the defendant, and upon the terms that the price and value of the work to be done, and the materials for the same to be provided by the defendant in *repairing* the said goods and chattels as aforesaid, should be paid when the said repairs were completed, [and that the defendant should have a lien on the said goods and chattels for such price and value, and be entitled to hold the same goods and chattels as a security for the payment of such price and value by the plaintiff (*o*),] and the defendant avers that he then received the said goods †and chattels of and from the plaintiff on the said terms and not otherwise, and before the said time when, &c. to wit, on the day and year last aforesaid, did work and found the necessary materials in and about the repairing, and then repaired the said goods and chattels for the plaintiff upon the said terms, and the said repairs were then completed, and the reasonable price and value of the same therefore payable to the defendant amounted to a certain sum, to wit, £——, whereof the plaintiff then had notice, and was then requested by the defendant to pay him the said sum, but the plaintiff hath neglected so to do [nor hath he tendered to the plaintiff the said sum of £——, or any part thereof, (*p*)] and the same before and at the said time when, &c. and at the time of the commencement of this suit was and is wholly due and in arrear, wherefore the defendant hath continually held and detained, and now holds and detains the said goods and chattels, as such lien and security for the said sum of £——, and at the said time when, &c. refused to deliver up the same to the plaintiff on being then required by him so to do, as the defendant lawfully might, being the said supposed conversion in the declaration mentioned; and this the defendant is ready to verify, &c.

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(*n*) See a Form, Judson *v.* Etheridge, 1 C. & M. 743. By implication of law every workman has a lien for work done in respect of goods for the price of such work and necessary materials, if due and unpaid; see Chase *v.* Westmore, 5 M. & Sel. 180; Jacobs *v.* Latour, 5 Bing. 130, 2 M. & P. 201; provided there be no outstanding security not due; Hewison *v.* Guthrie, 2 Bing. N. C. 759. A lien is lost by parting with the possession, or by claiming to hold the goods upon another inconsistent ground; Sweet *v.* Pym, 1 East, 4; Boardman *v.* Sill, 1 Campb. 410, note; Hartley *v.* Hitchcock, 1 Stark. R. 408; White *v.* Gainer, 9 Moor. 41; 2 Bing. 23; 1 C. & P. 324; see in general Harr. Ind. Lien; 3 Chit. Commerc. Law, 537; Whitaker on Lien.

(*o*) This allegation between the brackets seems to be unnecessary, but is sometimes introduced.

(*p*) The allegation between the brackets is sometimes used, but appears to be unnecessary.

2. *Plea of a General Lien by a Custom of Trade: the Lien having been acquired against a former Owner of the Goods.* (*q*)

And for a further plea in this behalf, the defendant saith, that long before and at the said time when, &c. he the defendant was and still is a silk throwster, and the trade and business of a silk throwster, he the defendant, during all the time aforesaid, used, exercised, and carried on, and that long before and at and during that time, and at the times hereinafter in this plea mentioned, there was and still is a certain good and laudable custom or usage, (*r*) used and approved of throughout England, in the said trade or business of silk throwsters, that any person or persons using the said trade or business in England, and bestowing work and labor in the way of their said trade or business, upon any silk delivered to him or them for the purpose of being twisted or thrown, may retain and keep such silk until as well the price of the work and labor by him or them bestowed on such silk, in or about the twisting or throwing the same, as also all and every sums and sum of money which, at the time of the delivery of such silk, may be due or owing to him or them, from the person or persons so delivering the same to be twisted or thrown as aforesaid, for or in respect of the twisting or throwing of any other quantity of silk before that time twisted or thrown for and on behalf of such last mentioned person or persons, by the said person or persons so using the trade or business of silk throwsters as aforesaid, shall be fully paid and satisfied; and the defendant further saith, that one L. C. before the delivery of the said silk in the said declaration mentioned, to the defendant to be twisted and thrown as hereinafter mentioned, and before the said time when, &c. to wit, on [*&c.*] with notice of the said custom or usage, delivered to the defendant, and the defendant received from him, divers large quantities of raw silk to be by him twisted and thrown in the way of his said trade and business of a silk throwster, by him then carried on, for reward to him upon the terms of the said custom or usage, and the defendant then performed and bestowed thereon his work and labor in and about the twisting and throwing the same, in the way of his said trade and business, and the said L. C. thereby then became and was indebted to the defendant in a certain large sum of money, to wit, the sum of £——, for and in respect of the said last mentioned work and labor, which said sum of money at the said time when, &c. was and thenceforth hitherto hath remained and continued, and

(*q*) Plea of general lien by woolfullers, they carrying on business on the terms of such lien; Cumpston *v.* Haigh, 2 Bing. N. C. 449; 2 Scott, 684, S. C. Replication, *id.* Plea of general lien, by a warehousekeeper in London, held bad; Leuckhart *v.* Cooper, 3 Bing. N. C. 99; 3 Scott, 521, S. C.

(*r*) Or, *semble*, it might be judicious (instead of stating the claim as a *custom*) to plead, after showing the first transaction, that the goods in question were delivered and received "on the terms," that the defendants should have a lien as well for the former debt for twisting, as for the demand in respect of the particular goods; see *post*, 695, Form 4.

still is wholly due and in arrear to the defendant; and the defendant further saith, that the said L. C. being so indebted to the defendant as aforesaid, and the defendant so using, exercising, and carrying on the said trade and business of a silk throwster as aforesaid, he the said L. C. with notice of the said custom or usage, before the said time when, &c. to wit, on [*&c.*] delivered to the defendant, and the defendant then received from him, the said silk in the said declaration mentioned, the same then being in a raw and unwrought state, to be by the defendant twisted and thrown in the way of his said trade and business, for reward to him upon the terms of the said custom or usage; and the defendant afterwards, and before the said time when, &c. to wit, on the day and year last aforesaid, performed and bestowed other his work and labor, care, and diligence thereon, in the way of his said trade and business, in and about the twisting and throwing the said last mentioned silk, for which he the defendant reasonably deserved to have a certain other large sum of money, to wit, the further sum of £——, and the same is now and wholly due and in arrear and unsatisfied to the defendant; and the defendant further saith, that the plaintiff, at the time the said silk in the said declaration mentioned was so delivered to the defendant by the said L. C., to be twisted and thrown as aforesaid, and at the time the defendant performed and bestowed his said work and labor, care, and diligence thereon as aforesaid, and when the said L. C. became and was so indebted to the defendant as aforesaid, had not any property whatsoever in the last mentioned silk or any part thereof, or any right thereto, and that the plaintiff's property therein and the right thereto, which the plaintiff hath since acquired, have been acquired from and through the said L. C., since the †delivery of the same silk to the defendant for such purpose as aforesaid, and since the defendant performed and bestowed such last mentioned work and labor, care and diligence, and since the said L. C. became indebted and in arrear to the plaintiff as to the said several debts and before the said time when, &c. of all which said several premises the plaintiff before and at the said time when, &c. had notice, wherefore he the defendant afterwards, and when he was requested by the plaintiff to deliver up to him the said goods and chattels, in the declaration mentioned, to wit, at the said time when, &c. refused to deliver up the same to the said plaintiff, until he the said defendant was paid and satisfied the said several sums of £—— and £——, so due and owing to him as aforesaid, and hath continually detained and still detains the same as a lien and security for the payment of the said moneys, as the defendant lawfully may for the cause aforesaid, which is the conversion in the said declaration mentioned; and this the defendant is ready to verify, &c.

[†694]

### 3. *Plea of General Lien by an Attorney.* (*s*)

And for a further plea in this behalf, the defendant saith, that whilst the plaintiff was possessed of the said instruments in writing, in the declaration mentioned, as of his own property, and before the said time when, &c. to wit, on [*&c.*] he the plaintiff delivered the said instruments in writing to the defendant, then and still being an attorney of her majesty's Court of Queen's Bench at Westminster, and a solicitor of the High Court of Chancery, and a practising conveyancer for fees and reward, as such attorney, solicitor, and conveyancer, for the purpose of enabling the defendant, as such attorney, solicitor, and conveyancer, to do and transact divers affairs and businesses, as such attorney, solicitor, and conveyancer, for the plaintiff with and in respect of the said instruments in writing, and with and in respect to the property to which the same related, and the same have ever since remained in the possession of the defendant; and the defendant further says, that the plaintiff at the time of the delivery of the said instruments in writing to the defendant, and also before and at the said time when, &c. was and still is indebted to the defendant in a large sum, to wit, the sum of £—— for work and labor before then done by the defendant, as such attorney, solicitor, and conveyancer for the plaintiff, and upon his retainer, and at his request, and for fees due and payable to the defendant in respect thereof, and in a large sum, to wit, £—— for money paid, laid out and expended by the defendant as such attorney, solicitor, and conveyancer for the plaintiff, and at his request, by reason whereof the defendant, during all the time aforesaid, was and still is entitled to hold and detain the said instruments in writing, as and for a lien for the said sums of money so due and owing to him as aforesaid; wherefore the defendant hath detained and still detains the same, and at the said time when, &c. refused to deliver the said instruments or either of them to the plaintiff, on his then demanding the same, as the defendant lawfully might and may for the cause aforesaid; and this the defendant is ready to verify.

### 4. *Trover for an Exchequer Bill:—Plea of General Lien by Bankers, the Plaintiff having allowed their Customer to appear to be the Holder, &c.* (*t*)

And for a further plea in this behalf, the defendants say, that long before and at the said time when, &c. the said defendants were bankers, and carried on business as bankers in copartnership together in London,

(*s*) Attorneys have a general lien; see Tidd, 9th ed. 337; Chit. Arch. 5th ed. 36, 65; 1 Harr. Ind. "Attorney."

(*t*) As to the lien of bankers, see 1 Harr. Ind. tit. "Bankers," IV. They have a *general* lien; Jourdaine *v.* Lefevre, 1 Esp. R. 66; see Chit. Pl. 8th ed. 725, 237.

and one E. F. kept cash and an account with the defendants as such bankers, upon the following amongst other terms, that is to say, that the defendants should have a lien upon any securities lodged and deposited with the defendants as such bankers by the said E. F., and should have a right to retain them to countervail any liabilities incurred by the defendants in favor of the said E. F., or any debt due or to become due from the said E. F. to the defendants, whilst the securities so remained deposited as aforesaid, such securities being securities, the property wherein passed and might pass by transfer and delivery, and provided no special agreement was made between the defendants and the said E. F. in that behalf; and the defendants further say, that the said instrument or security for the payment of money in the said declaration mentioned, was a certain instrument or security called an Exchequer Bill, issued and granted under and by virtue of an Act of Parliament made and passed in the year of our Lord ——, intituled, [*&c.*]; and the defendants further say, that the said bill was and is a certain bill for £——, bearing date the —— day of ——, A. D. ——, and was and is in form as follows, that is to say, [*copy it*]; and the defendants further say, that before and at the said time when, &c. the blank in the said bill had not been filled up, and the said bill was a security payable to the bearer thereof, and transferable by delivery; and the defendants further say, that before the said time when, &c. to wit, on [*&c.*] the said E. F. lodged and deposited, and suffered to be lodged and deposited with the defendants as such bankers the said exchequer bill, and they received the same *bona fide*, in the usual and accustomed manner, upon the terms herein first mentioned, and without any special agreement in that behalf, and without any notice to the defendants or either of them, that any other person whatsoever, save and except the said E. F. had any claim or interest whatsoever in or to the said exchequer bill, or any or either of them, and that they were enabled so to lodge and deposit it without notice, by and through the omission and neglect and want of due care on the part of the plaintiff; and the defendants further say, that whilst the said exchequer bill remained and continued so lodged and deposited with the defendants, they the defendants, as such bankers as aforesaid, made divers payments for and on account of the said E. F. exceeding the sums of money in the hands of the defendants, on account of the said E. F., to a large amount, to wit, to the amount of £——, and the said E. F. thereby then and there became and was and still is indebted to the defendants in the said sum of money, which said sum remaining wholly unpaid and unsatisfied, and not tendered to the defendants, they the defendants, when so requested as in the said declaration mentioned, refused to deliver the said Exchequer Bill in the said declaration mentioned to the plaintiff, as in the said declaration mentioned, and did at the said time when, &c. retain and keep the same under and by virtue of the said lien and right before mentioned, and as they lawfully might for the cause aforesaid, which said keeping

and detaining were and are the conversion and disposing of the said exchequer bill to their own use in the said declaration mentioned; and this the defendants are ready to verify, &c.

5. *Plea, that the Deeds were deposited as a Security for Moneys due at the time of the Deposit, and thereafter to accrue due.*

And for a further plea in this behalf, the defendant saith, that heretofore and before the said time when, &c. to wit, on [*&c.*] a certain sum of money, to wit, the sum of £—— was due and owing from the plaintiff to the defendant, and the said sum of money being so due and owing, it was then agreed by and between the plaintiff and the defendant in consideration thereof, [and also in consideration that the defendant would make further advances of money to the plaintiff,] that he the plaintiff should deposit with the defendant the said deeds, instruments, and writings in the said declaration mentioned, as a security, as well for the payment of the said sums of money, so then due and owing to the defendant as aforesaid, as also for the repayment of all such sums of money as the defendant should thereafter advance to the plaintiff, and that the defendant should hold and detain the said deeds, instruments, and writings until the said sum of money so then due and owing to the defendant as aforesaid, and also all such sums of money as should thereafter be advanced by the defendant to the plaintiff, should be so repaid and satisfied; and the defendant further says, that afterwards and before the said time when, &c. to wit, on [*&c.*] last aforesaid, the plaintiff did in pursuance of the said agreement deposit with the defendant the said deeds, instruments, and writings for the purpose and upon the terms aforesaid, and the defendant did thereupon afterwards and before the said time when, &c. to wit, on [*&c.*] last aforesaid, advance to the plaintiff at his request divers large sums of money, amounting to a large sum of money, to wit, the sum of £——; and the defendant further says, that the plaintiff hath not paid or satisfied to the defendant the said first-mentioned sum of money so due and owing to the defendant as aforesaid, or the said several sums so advanced by him after the said deposit as aforesaid, and the same remain wholly unpaid and unsatisfied, wherefore the defendant hath continually hitherto detained and still detains the said deeds, instruments, and writings, as he lawfully may for the cause aforesaid, and at the said time when, &c. refused to deliver the same to the plaintiff, on his demanding the same, being the conversion in the declaration mentioned; and this the defendant is ready to verify.

### 6. *Replication, that the Plaintiff tendered the Amount of the Lien.* (*u*)

And the plaintiff, as to the plea of the defendant by him [lastly] above pleaded, saith, that after the plaintiff had delivered the said goods and chattels in the said declaration mentioned to the defendant, and after he had done and performed the said work, and provided the said materials, [*this will of course depend upon the words of the plea*] and before the commencement of this suit, to wit, before and at the said time when, &c., that is to say, on [*&c.*] aforesaid, the sum of £—— was all the money due and owing from the plaintiff to the defendant for the said work and materials, for and in respect of which the defendant was entitled to hold, retain, and keep the said goods and chattels as a lien, pledge, and security as aforesaid, and the plaintiff then tendered and offered to pay to the defendant the said sum of £——, in satisfaction and discharge of the said lien, such last-mentioned sum being sufficient to satisfy and discharge the same, and the plaintiff then requested the defendant to deliver up to the plaintiff the said goods and chattels, but the defendant then refused to accept or receive the said sum so tendered and offered as aforesaid, or to deliver up the said goods and chattels, or either of them, to the plaintiff, and then converted and disposed of the same to the defendant's use, and which is the conversion in the said declaration mentioned; and this the plaintiff is ready to verify, &c.

### †7. *To a Plea of Lien:—Replication, that Defendant wrongfully delivered part of the Goods to other Persons, and destroyed the remainder.*

And as to the said last plea, the defendant saith, that after the said goods and chattels in the declaration mentioned had been and were delivered by the plaintiff to the defendant, as in the last plea alleged, and whilst the defendant so had the same in his charge and held the same as aforesaid, and before the commencement of this suit, to wit, at the said time when, &c. he the defendant wrongfully and injuriously, without the

(*u*) Form, &c. Marks *v.* Lahee, 3 Bing. N. C. 408; 4 Scott, 137, S. C.; and the Form 14, *ante*, 685. The *rejoinder* to the above replication was, that the sum so tendered and offered to the defendant as aforesaid, in satisfaction and discharge of the said lien, was not sufficient to satisfy and discharge the same in manner and form as the plaintiff hath alleged; and of that the defendant put himself upon the country, &c. It was held that this was not an immaterial issue, although the replication laid the sum tendered under a *scilicet*. The sum is material, and the rejoinder should be as above, or that the plaintiff did not tender the sum named, and not that a sufficient sum was not tendered; *id.*; see also Williams *v.* Price, 3 B. & Ad. 695. It seems that as a lien involves a claim of *interest* in the goods, and in effect the party relying upon it derives authority from the plaintiff, the general replication *de injuriâ* (though often used in these cases) is not correct, and might be demurred to; see Steph. 3d ed. 164, 264; 1 Chit. Pl. 6th ed. 608; and the note to the Replication *de injuriâ* in *Trespass*, *post*.

plaintiff's consent, and in violation of the defendant's duty in that behalf, sold and delivered, and parted with to other persons than the plaintiff, whose names are to the plaintiff unknown, part of the said goods and chattels in the said declaration mentioned, that is to say, [*one table*] parcel of the said goods and chattels, and then wrongfully and injuriously, without the plaintiff's consent, destroyed the residue and remainder of the said goods and chattels, which are the conversion and disposition to the defendant's use, in the said declaration mentioned, of the said several goods and chattels therein specified; and this the plaintiff is ready to verify, &c.

### 8. *Other Replications to Pleas of Lien.*

[Replication to a plea of lien for a sum for work done to several goods, that the works were done under *separate* and *distinct contracts*; Marks *v.* Lahee, cited *ante*, 691, note (*m*).

To a plea of general lien, replication that the goods were not delivered on the terms stated, &c.; Cumpston *v.* Haigh, 2 Bing. N. C. 449; 2 Scott, 684, S. C.]

## LIMITATIONS, PLEA OF. (*x*)

## PAYMENT INTO COURT. (*y*)

[In trover for goods, the defendant pleaded payment of money into Court, and the plaintiff replied, that he had sustained more damages. The defendant paid into Court the cost price of the goods, having offered the goods in specie to the plaintiff two days only after they ought to have been delivered. †The plaintiff proved that he had sustained inconvenience and loss by not having the goods delivered at a proper time. The jury, however, found for the defendant, and the Court refused to set aside the verdict; Evans *v.* Lewis, 3 Dowl. P. C. 819.]

(*x*) The plea will be in form as *ante*, 643; see *id.* note. See the case of Philpot *v.* Kelly, 3 Ad. & E. 106; 1 Harr. 134; in which this ground of defence in trover was much considered.

(*y*) Money may by leave of the Court or a judge be paid into Court as damages, in trover, to the whole or part of the declaration; see *ante*, 651.

## SHERIFFS(z)

### *Plea of justification by a Sheriff under a fieri facias against the Goods of a third person who had fraudulently assigned to Plaintiff.* (*a*)

And for a further plea in this behalf, the defendant says, that before and at the time of the pretended and fraudulent conveyance hereinafter mentioned, and before the said time when, &c. one C. N. was indebted to T. N. in a large sum, to wit, £——, and thereupon the said T. N. afterwards and before the said time when, &c., to wit, on [*&c.*], for the recovery of the said debt impleaded the said C. N. in the Court of our lady the queen of her Exchequer of pleas at Westminster in an action on promises, and such proceedings were thereupon had, that afterwards and before the said time when, &c., to wit, on [*&c.*], the said T. N. by the consideration and judgment of the same Court recoverd against the said C. N. a large sum of †money, to wit, the sum of £——, which was adjudged

(z) Where a sheriff sued in trover for seizing goods under a fieri facias denies the seizure, or contends that he is not liable (as that the process was out of the County Court, of which he is a judge; Tunno *v.* Morris, 2 C. M. & R. 298, 299; 1 Gale, 259; or that the bailiff's act was not binding on him, the sheriff,) he should plead not guilty. But where the seizure of the plaintiff's goods is admitted, there should be a special plea of justification by the sheriff in trover, as well as in trespass; see *post*, "Trespass," pleas "Sheriff," for the form of a plea of justification under a fieri facias against the goods of the *plaintiff* suing in trover. Form of action, &c. against sheriffs; 1 Chit. Pl. tit. "Sheriff." Plea justifying under a fieri facias against a bankrupt in trover by his assignees; see *ante*, 688, Form 17. Plea by sheriff, that he seized goods under a fieri facias against A. B., the apparent owner, by plaintiff's consent, and that A. B. became bankrupt, whereupon sheriff delivered the goods to his assignees; 3 Chit. Pl. 6th ed. 1005, 1006; see Form 17, *ante*, 688.

(*a*) In Farrar *v.* Beswick, 1 M. & W. 682, the defendant pleaded that a judgment was recovered against E. F., and that the defendant, as sheriff's officer, seized the goods under an execution against the said E. F., the same being his goods and liable to be taken, *and not the plaintiff's property*. The plaintiff replied the goods were his property. The jury found they were the property of *plaintiff and E. F. jointly*. The Court decided that the issue was, whether the goods were E. F.'s *sole* property, and that plaintiff was entitled to a verdict. Parke, B. thought the plea was no more than a special traverse of the plaintiff's title. The plea should have specially shown the real title. In Nicolls *v.* Bastard, 1 Tyr. & G. 159; 1 Gale, 295; 2 C. M. & R. 659; the plea justified under an execution against J. H. who fraudulently sold to plaintiff. Replication denying fraudulent sale of the goods and chattels mentioned in the declaration. The particular of demand was merely "one cow." It appeared that the plaintiff had lent a cow to J. H, that the goods of plaintiff were fraudulently sold to avoid an execution, and the greater part of them bought by the plaintiff; that the plaintiff's cow was not sold, nor was any cow sold at such sale: held, that plaintiff was entitled to a verdict on the above issue. Parke, B. "There was no cow sold at all; it is clear therefore your plea was not sustained. The whole defence stated in the plea would in truth have been admissible under the common plea of no property." When a sale or conveyance is deemed fraudulent and void against an execution creditor; 13 Eliz. c. 5; Tidd, 9th ed. 1004; Chit. jun. Contr. 2d ed. 324 to 329; 2 Harr. Ind. tit. "Deed, VI.;" Martindale *v.* Booth, 3 B. & Ad. 498.

to the said T. N. in and by the said last mentioned Court for his damages by him sustained, as well on occasion of the not performing a certain promise and undertaking before then made by the said C. N. unto the said T. N., being a promise and undertaking to pay the said debt so due to the said T. N. as for his costs and charges by him, the said T. N. about his suit in that behalf expended; whereof the said C. N. was convicted, as by the record and proceedings thereof still remaining in the said last mentioned Court fully appears; and the defendant further saith, that the said judgment being in full force, and the said damages being justly due and remaining unpaid and unsatisfied, he, the said T. N., for the recovery thereof, afterwards and before the said time when, &c., to wit, on the day and year last aforesaid, sued and prosecuted out of the said last mentioned Court a certain writ of our said lady the queen, called a fieri facias, directed to the sheriff of the county of ——, by which said writ our said lady the queen commanded the said sheriff that of the goods and chattels of the said C. N. in his the said sheriff's bailiwick, he should cause to be levied the damages aforesaid; and that he should have that money before the barons of the last mentioned Court at Westminster, immediately after the execution thereof, to render to the said T. N. for his said damages, and that the said sheriff should have there then that writ, which said writ afterwards and before the delivery thereof to the said sheriff as hereinafter mentioned, was duly indorsed with a direction for him, the said sheriff, to levy £——, besides sheriff's poundage, officers' fees and other incidental expenses, and which said writ so indorsed, afterwards, and before the said return thereof, to wit, on the day and year last aforesaid, was delivered to the said now defendant, who then and from thence, whilst the said writ was in force, was sheriff of the said county of ——, to be executed in due form of law; and the defendant further says, that the said goods and chattels in the said declaration mentioned, before and at the said time when, &c. were the goods and chattels and property of the said C. N., and that the plaintiff claimed title to the same under color of a certain conveyance made by the said C. N. to the plaintiff of the said goods and chattels for a certain pretended consideration, to wit, the pretended consideration therein mentioned, to the end, purpose and intent to hinder and defraud the said T. N. as and being the creditor of the said C. N. of his just debt and damages aforesaid, contrary to the form of the statute in such case made and provided, by virtue of which said writ and indorsement the defendant, as such sheriff as aforesaid, did afterwards and whilst the said writ was in force, to wit, at the said time when, &c. seize and take the said goods and chattels in the said declaration mentioned, being the goods and chattels and property of the said C. N. as aforesaid, for the purpose of levying, and did then levy thereout the moneys so directed to be levied by the said indorsement on the said writ as aforesaid, as it was lawful for

him to †do for the cause aforesaid, being the said supposed conversion in the said declaration mentioned; and this the defendant is ready to verify.

## STOPPAGE IN TRANSITU.

[Plea to a declaration in trover,—*Stoppage in transitu* by the plaintiff as vendor of the goods, and replication thereto; *ante*, 683, 684, Forms 11, 12.]

# REPLEVIN (*a*)—DECLARATIONS IN.

## 1. *Declaration in the Superior Court.*

In the Q. B. [*or* " C. P."]

On the —— day of ——, A. D. ——, as of —— Term, 1st Victoria. (*b*)

——, to wit, [*venue local (c)*.] C. D. was summoned to answer A. B. of a plea, wherefore he took the [" cattle,"] goods and chattels [" and corn," *as the case may be,*] of the plaintiff, and unjustly detained the same against sureties and pledges until, &c., and thereupon the plaintiff, by —— his attorney, complains. For that the defendant on the —— day of ——, A. D. ——, [*the exact day of distress is not material,*] in the par-

(*a*) Where goods or cattle are *distrained* for rent or a rent-charge, or for a poor-rate, &c. or *damage feasant*, the usual course to obtain restitution and try the validity of the seizure, is for the owner to make a plaint to the sheriff of the county to have the goods *replevied;* that is, re-delivered to him:—and upon this occasion it is the duty of the sheriff, (without writ out of Chancery, according to the ancient practice,) to cause the effects to be redelivered to the owner on his giving the sheriff security that he will forthwith prosecute an action of *replevin* against the distrainer in the County Court to try the legality of the distress; and will, if its validity be established, return the goods to the distrainer. The party distrained upon accordingly levies a plaint and declares in the Sheriff's County Court; but the suit is usually *removed* into the Superior Court, wherein the plaintiff declares *de novo* The replevy is in effect *in rem* to have the cattle or goods again, and the suit in replevin is instituted to try the right of distress. The plaintiff must, as in trover, (*ante*, 663, note,) be the general owner or a special owner, and must have the possessory right; see in general 3 Bla. C. 147; Wilkinson on Replevin; 1 Saund. 347 b, note 2; 1 Chit. Pl. 5th ed. 174; 6th ed. 162; 2 Stark. Ev. 2d ed. "Replevin," 714; Selw. N. P. tit. "Replevin." Replevin is the proper form of proceeding to recover possession of a specific chattel; Dore *v.* Wilkinson, 2 Stark. R. 288. This action lies for an *illegal taking* in the first instance, or for an *unlawful detention* after a *legal* taking; Evans *v.* Elliot, 6 N. & M. 606, T. T. 1836; 5 Ad. & E. 142, S. C.

Any issue in replevin in which the affirmative proof is on the plaintiff, gives him a right to begin at the trial; James *v.* Salter, 1 M. & Rob. 501.

As to judgment, damages and costs in replevin, see 2 Chit. Arch. 5th ed. 705; Tidd, 9th ed. 931.

(*b*) Replevin and Ejectment, not being commenced in the superior Courts by summons or *capias*, are not within the Uniformity of Process Act, 2 W. 4, c. 39, or the New Pleading Rules, in regard to the title of the declaration; and, consequently, the declaration in replevin should as heretofore be entitled generally of the term in which the writ of *re. fa. lo.*, by which the suit was removed from the Sheriff's Court, was returnable, or in which the defendant appears and the plaintiff declares. In practice it is however usual to entitle the declaration of the particular day of delivery if in term, thus, "on the —— day of ——, A. D. ——, in —— term, 1 Victoria;" or, if in vacation, "on [*&c.*] *as of* —— term," &c.

(*c*) The venue may be in the county where the distress was originally taken, or in a county in which the goods were in the defendant's custody upon the occasion; Wilson *v.* Kersop, 2 Wils. 354.

ish of ——, in the country of —— aforesaid, in a certain *dwelling-house* there [*or* "in a certain close," *or* "common" there called ——, (*d*)] took the ["cattle,"] goods and chattels †of the plaintiff, to wit, ten tables, (*e*) of great value, to wit, of the value of £——, and unjustly detained the same against sureties and pledges, until &c.; wherefore the plaintiff saith, that he is injured and hath sustained damage to the amount of £——; (*f*) and therefore he brings his suit, &c.

## 2. *Declaration in Replevin in the County Court.*

In the County Court of the Sheriff of ——.

——, to wit. C. D. was summoned, [*&c. proceed precisely as in* Form 1, *except that it is necessary to add after the words*, "in the county of —— aforesaid," *the words*, "and within the jurisdiction of this Court took," *&c.*]

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(*d*) The place, as whether it was a house, yard, or close, must be stated accurately: and it seems the name or abuttals of the close should be specified; 1 Saund. 347, note 1; Potten *v.* Bradley, 2 M. & P. 78; or the declaration will for the omission be demurrable, see Form 6, *ante*, 30. The caption may be stated to be in the place where the original seizure was, or in a close or place wherein the distrainor afterwards led or had the goods or cattle in the way to the pound; 1 Saund. 347, n. 1; Walton *v.* Kersop, 2 Wills. 354. Where different effects are stated in various places the form should be "in a certain dwelling-house there took the goods, to wit, —— and in a certain yard, [*or* "close,"] there took other the goods, to wit ——," *or* "the cattle, to wit, ——," &c.; Com. Dig. Pleader, 3 K. 10. The plea of non cepit disputes the correctness of the declaration as to the place of seizure.

(*e*) The goods, &c. must be described with at least as much certainty as in *trover* (*ante*, 664, note (*d*),) see 2 Saund. 74 b. The following form describes the seizure of *standing* corn under 11 G. 2, c. 19, s. 8, "in a certain close there called ——, took the corn of the plaintiff, to wit, —— acres of standing *wheat* there then growing." Replevin does not lie for fixtures *qua* fixtures; Niblet *v.* Smith, 4 T. R. 504; Amos, Fix. 252, 257.

(*f*) A sum covering the real damage.

# REPLEVIN—PLEAS, AVOWRIES, &c. IN.(a)

## NON CEPIT.

### 1. *Plea of Non Cepit.*(a)

In the ——

On the —— day of —— A. D. ——,
as of —— Term, 1 Victoria.

C. D. and ats. / A. B. } And the defendant, by ——, his attorney, [*or* "in person,"] says, that he did not take the said cattle, goods and chattels, [*as in declaration,*] or either of them, or any part thereof, in manner and form as the plaintiff hath above alleged; and of this the defendant puts himself upon the country, &c.

### 2. *Plea denying the Plaintiff's Property in the Goods.*(b)

And the defendant, by ——, his attorney, says, that the said *goods and chattels* in the said declaration mentioned, at the said time when, &c. were the property of the defendant, [*or* "one E. F."] and not of the plaintiff as in the said declaration alleged, and this the defendant is ready to verify; where fore he prays judgment if the plaintiff ought to maintain his aforesaid action thereof against him.(c) And the defendant also prays a

(a) The New Rules on Pleading contain no provisions altering the form or effect of the pleadings in replevin. *Non cepit* is the proper plea where the defendant denies that he was the party distraining; or that he took or had the distress in the place described in the declaration, and relies on a mistaken description of the *locus in quo;* but in this latter case, in order to have judgment for a return of the goods, the defendant should plead that he took the goods or cattle in another place, describing it, not in the place mentioned in the declaration, and then add an avowry of the taking, showing the cause; 1 Saund. 347, note 1. Forms Bullythorpe *v.* Turner, Willes, 475; 3 Chit. Pl. 5th ed. 1045; 6th ed. 950. The plaintiff in this instance must amend his declaration or traverse the taking in the place mentioned, in the plea; he cannot traverse the *cause* of taking alleged in the avowry; *id. Non cepit* does not enable the defendant to dispute the plaintiff's *property* in the goods, (see Form 2,) or to *justify* the caption. It is sufficient for the plaintiff to prove on this issue that the defendant originally took, *or* afterwards had or detained the goods in the *locus in quo;* see *id.;* 2 Stark. Ev. 2d ed. 714, 715.

(b) Bull. N. P. 52, 54; Carth. 244; 3 Chit. Pl. 5th ed. 1044; 6th ed. 950; Evidence, 1 Mo. & R. 301. It will be observed that this varies from the form of traverse of the plaintiff's title in *trover* and *trespass*. This is the proper form of pleading to try the plaintiff's title to the goods distrained, where the seizure is admitted, and not justified.

(c) *Qu.* As to the necessity for this prayer of judgment since the New Rules?

return of the said goods and chattels, together with his costs in this behalf, according to the form of the statute in such case made and provided, to be adjudged to him, &c.

## †ANNUITIES.

### 1. *Avowry, &c. for an Annuity or Rent Charge.*

[See Forms James *v.* Salter, 2 Bing. N. C. 505; 3 id. 544; 4 Scott, 168, S. C.; Richardson *v.* Tomkies, 9 Bing. 51; Caunt *v.* Ward, 7 Bing. 608; 5 M. & P. 618, S. C. Cognizance as bailiff of the grantee of an annuity charged upon the locus in quo, and granted by a tenant for life; Miller *v.* Green, 2 C. & J. 142, in error; 8 Bing. 92, S. C. See pleas in bar, *infra*, and 3 Chit. Pl. 5th ed. 1192; 6th ed. 1116. Avowry for a rent-charge, 3 Chit. Pl. 6th ed. 961; Beaupark *v.* Hutchinson, 7 Bing. 178; 4 M. & P. 848, S. C.]

### 2. *Pleas in bar to an Avowry for an Annuity bequeathed by Will.*

#### 1. *Denial of the Will.*

*Commencement post*, 708, Form 1.]—That the said D. R. did not make and publish his last will and testament in writing, signed by him the said D. R., and attested and subscribed in the presence of the said D. R. by three credible witnesses, according to the form of the statute in such case made and provided, (*d*) in manner and form as the defendant hath above in his said avowry in that behalf alleged; and this the plaintiff prays may be inquired of by the country, &c.

#### 2. *Denial of the Bequest.*

—That the said D. R. did not give and bequeath unto the defendant E. R., the widow of his late son, A. H. R., or her assigns, one annuity or annual sum of £——, for and during the term of her natural life, if she should so long continue a widow and unmarried, in manner and form as the defendant hath above in his said avowry in that behalf alleged; and this he, the plaintiff, prays may be inquired of by the country, &c.

#### 3. *That the Testator was non compos.*

—That the said D. R. at the time of making and publishing the said will and testament in the said avowry mentioned, was not of sound and

(*d*) See now 1 Victoria, c. 26.

disposing mind, memory, and understanding; and this he, the plaintiff, is ready to verify; wherefore he prays judgment, [*&c. as post*, 710, Form 4.

## DAMAGE FEASANT.

### *Avowry or Cognizance of Distress for damage feasant.* (*e*)

*Commencement as infra*, Form 1.] Because he saith that the said *close* in which [*&c.*] now is and at the said time when &c. was the close, soil, and freehold of the defendant, [*or* "of one E. F."] and because the said cattle at the said time when &c. were in (*f*) the said close in which &c. eating the grass there then growing, and doing damage there to the defendant, [*or* "to the said E. F."] he, the defendant, well avows, [*or* "as bailiff of the said E. F. well acknowledges,"] the taking of the said cattle in the said close in which &c., and justly &c., as for and in the name of a distress for the said damage so there done and doing as aforesaid; and this [*&c. conclude as in the* Form 1, *infra*.

## LANDLORD AND TENANT.

### 1. *Common Avowry or Cognizance for Rent in Arrear.* (*g*)

And the defendant, by —— his attorney, [*or* "in person,"] well *avows*

(*e*) See 1 Saund. 347 d, note 6; 2 *id.* 284 d; 3 Chit. Pl. 5th ed. 1057; 6th ed. 962; 2 Harr. Ind. tit. Distress, III. In *trespass* the defendant may rely only upon his *possession* in the above instance, but in replevin a *title* to the close must be shown. If the defendant were the lessee or yearly tenant of the freeholder, state that the latter was seised "in his demesne as of fee," and then show the demise and entry of defendant; see *id. ante*, 474, Form 4. Avowry by commoner, 3 Chit. Pl. 5th ed. 1059; 6th ed. 964. Pleas in bar, 3 Chit. Pl. 5th ed. 1195; &c.; 6th ed. 1120, &c.

(*f*) The party distraining must get into the close before the cattle have left it; Clement *v.* Milner, 3 Esp. R. 95.

(*g*) This general form is sanctioned by 11 Geo. 2, c. 19, s. 22, which enacts that "all defendants in replevin may avow or make cognizance generally, that the plaintiff or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent, during the time wherein the rent distrained for incurred, which rent was then due and still remains due; or that the place where the distress was taken was parcel of such certain tenements held of such honor, lordship, or manor, for which tenements the rent, relief, heriot, or other service distrained for, was, at the time of such distress, and still remains due; without further setting forth the grant, tenure, demise, or title of such landlord or landlords, lessor or lessors, owner or owners of such manor." See forms, &c. 3 Chit. Pl. 5th ed. 1046, 6th ed. 951; Innes *v.* Colquhon, 5 M. & P. 63; 7 Bing. 265, S. C.; and decision there as to the form. See a form where rent partly due from defendant's intestate, and the rest after his death, Braithwaite *v.* Cooksey, 1 H. Bla. 465. The statute 11 G. 2, c. 19, s. 22, applies although the rent were payable by special agreement in advance; Charters *v.* Sherrock, 1 Alcock & Napier, 17, 506, (*Irish.*) But the statute, though it warrants a general avowry, does not dispense with the necessity of stating the terms of holding; as to the parties who were landlord and tenant, the amount of

same, wherefore he, the plaintiff, did, according to the form of the statute in such case made and provided, then abate, deduct and keep in his own hands the said sum of £——, so paid for such tax out of the said rent in the said avowry and cognizance mentioned, and therein stated to be in arrear (being the next rent which accrued due to the said S. W. after he, the plaintiff, paid the said sum of £—— as aforesaid) the said sum of £——, being the amount of the tax which the said S. W. as landlord of the said dwelling-house in which &c. was liable to bear in respect of the said rent, and his estate and interest in the said dwelling-house; and this the plaintiff is ready to verify, wherefore inasmuch as the said C. D. hath avowed, and the said E. F. hath acknowleged the taking of the said goods and chattels in the said dwelling-house in which &c. the plaintiff prays judgment and his damages by reason of the taking and unjustly detaining the same to be adjudged to him, &c.

†5. *Replication, that the Tenant agreed to pay the Land Tax.*(u)

And the defendants as to the said plea in bar of the plaintiff as to the said avowry and cognizance so far as they relate to the said sum of £——, parcel &c. say, that the said C. D. ought not to be barred from avowing, nor ought he, the said E. F., to be barred from acknowledging the taking of the said goods and chattels in the said dwelling-house in which &c. and justly &c. because they say, that the said demise in the said avowry and cognizance mentioned, and under and by virtue of which the plaintiff at the said time when &c., and for and during the said space of time in the said avowry and cognizance mentioned, held and enjoyed the said dwelling-house in which &c. with the appurtenants as tenant thereof to the said C. D. was made by the defendant C. D. to the plaintiff upon the following amongst other terms, stipulations and agreements (that is to say) that the said yearly rent should be payable quarterly on the days and times and in the manner in the said avowry and cognizance mentioned, and that the same yearly rent should be payable and paid by the plaintiff to the defendant C. D. free from all deductions whatsoever, and that the plaintiff should pay and discharge all taxes whatsoever(x) which should at any time during the continuance of the said demise be assessed or rated on the said dwelling-house and become and be payable in respect thereof, so that the said C. D. might receive the said yearly rent clear of all deductions whatsoever; and this the defendants are ready to verify, wherefore they pray judgment [*&c. as ante*, 708, Form 1.

(u) See 2 Chit. jun. Contr. 2d ed. 270. Or the form should perhaps be simply that the plaintiff agreed to pay the land tax, to be charged upon the premises, &c.

6. *Plea in Bar to an avowry, that the Landlord had no reversionary interest.*

[See Forms, &c. and law, Pascoe *v.* Pascoe, 3 Bingh. N. C. 898; and Preece *v.* Corrie, 5 Bing. 24, there cited; 3 Chit. Pl. 5th ed. 1190, 6th ed. 1114, 1115. And see 1 Chit. Gen. Pr. 661; 4 M. & Scott, 539; 3 B. & Ad. 586. *Qu.* whether *non tenuit* or non demisit would be sufficient; see Pascoe *v.* Pascoe; Hooker *v.* Nye, 1 C. M. & R. 258, 260.]

7. *Plea in Bar, that the Goods were privileged as being on the Premises in the way of the Tenant's Trade, &c.*

[See Forms Muspratt *v.* Gregory, 1 M. & W. 633; Thompson *v.* Mashiter, 1 Bing. 283; see *ante*, 523, Forms 11, 12; *post*, "Trespass, Pleas—Distress."]

8. *Plea in Bar to an avowry for Rent in arrear, tender of the Rent and costs after the taking and before impounding.*

[See Form Evans *v.* Elliott, 6 N. & M. 606; 5 Ad. & E. 142, S. C. Plea of tender *before* the distress; 3 Chit. Pl. 5th ed. 1191, 6th ed. 1116, 1191. Tender on the land; *id.* 5th ed. 1018; 6th ed. 907.]

9. *Avowry justifying the detention as a Lien.*

[See form of avowry by carriers, justifying under a general lien, Galloway *v.* Bird, 4 Bing. 299; see Forms *ante*, 691 to 698.]

10. *Avowry for a Poor's Rate.*

[See concise Form on 43 Eliz. c. 2, s. 19; 3 Chit. Pl. 6th ed. 962; and special form Bardons *v.* Selby, cited *ante*, 709, note (*q*). *De Injuriâ* was there held to be a good plea in bar to an avowry for a poors' rate; and consequently no advantage is gained by avowing specially.]

# TRESPASS—DECLARATIONS IN. (*a*)

## I. TO THE PERSON.

### 1. *Declaration for an Assault, Battery, and Wounding.* (*b*)

*Commencement as ante*, 1, Form 1, "in an action of trespass."] For

(*a*) See in general as to this form of action, Vin. Ab. and Bac. Ab., Com. Dig. and Selw. N. P. tit. "Trespass;" 1 Chit. Pl. 5th ed. 190, 6th ed. 166; Steph. 3d ed. 16; 2 Stark. Ev. & Harr. Index, tit. "Trespass." In considering the nature of an action on the *Case*, we have already pointed out various instances in which an action of *Trespass* is maintainable, and the leading distinction between these forms of action; see *ante*, 496, 497, note (*a*). Trespass (in which *damages* only are claimed) is the remedy for an immediate or direct injury committed with *violence*: and this violence may be either *actual* or *implied*; and the law will imply violence though none is actually used, where the injury is of a direct and immediate kind, and committed on the *person* or *tangible* and *corporeal* property of the plaintiff. Of *actual* violence, an assault and battery is an instance; of *implied*, a peaceable but wrongful entry upon the plaintiff's land; Steph. 3d ed. 17.

1. For injuries to the *person* by an assault and battery, wounding, or false imprisonment, not under color of legal process, trespass is the only remedy. For a personal injury by driving a carriage, case for the negligence or trespass lies; but if the act were *wilful*, trespass must be brought, *ante*, 505, note (*i*). For the seduction or battery, &c. of a wife, or servant, the husband, or master, may maintain case or trespass. Case is the remedy for slander or injuries to health by nuisances, or for the malicious prosecution of proceedings at law.

2. For direct and violent injuries to, or the tortious *seizure* of *goods*, trespass is maintainable: provided the plaintiff's interest were not in *reversion* only, and he had the *possessory* right, or, as against a wrongdoer, the actual possession, at the time the injury was inflicted. As to the remedy for unlawful *distresses* for rent, see *ante*, 512, note (*u*).

3. Trespass is the proper remedy for an illegal *entry* upon, or *immediate* injury to, *real property corporeal, in the possession of the plaintiff* or his servants. *Case* is the appropriate form of action for an injury to an *incorporeal* right, as the obstruction of a right to light, or common of pasture, or a watercourse or way, or other easement. It is also the necessary form of action for an injury to a house or land, or other corporeal tenement in which the plaintiff has only a *reversionary* interest, and not a possessory right, and of which he has not possession.

In trespass for an injury to the *person* or *personal* property, the *venue* is *transitory* (except in certain actions against justices, constables, &c.; see Tidd, 9th ed. 430). In trespass to *realty*, the venue is local; and by the New Rules the *name* or *abuttals*, &c. of the close must be stated in trespass *quare clausum fregit*, *post*, 721, note (*g*).

There are certain formal peculiarities in a declaration in trespass which require attention: 1st. In that form of action the trespass must be charged positively and not by recital, and therefore the declaration must not be for that "*whereas*," the defendant, &c.; Steph. 3d ed. 388; 1 Chit. Pl. 5th ed. 421, 6th ed. 256, 387. 2d. The trespass must be laid to have been committed "*with force and arms*;" and 3d. "*against the peace*" of the queen; otherwise, in either case, a special demurrer will hold good; *id.* 5th ed. 422, 6th ed. 387, 388, 145.

The New Rules, in prohibiting several counts founded on one and the same principal matter of complaint, state, in reference to the action of *trespass*, "that seve-

that (*c*) the defendant, on the —— day of —— A. D. ——, (*d*) with force and †arms (*e*) assaulted (*f*) the plaintiff, and beat, bruised, [pushed, drag-

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ral counts for acts committed *at the same time and place*, are not to be allowed." The provision as to pleas in trespass will be noticed hereafter.

It is material briefly to consider the law of *Costs in trespass*, because the right to recover them materially depends in many cases on the state of the pleadings:—and the pleader in framing his pleadings in trespass, should advert to the effect which may be produced by them in reference to the costs, as well of particular issues as of the cause generally.

1. In trespass for an *assault and battery*, if the jury find damages under 40*s*., the plaintiff is entitled to no more costs than the damages so found, unless the judge at the trial shall find and certify under his hand upon the back of the record, that an assault and battery was sufficiently proved; 22 & 23 Car. c. 9. This enactment does *not* extend to actions for a *false imprisonment or a mere assault*, or for *criminal conversation*, or *battery* of the plaintiff's *servant, per quod consortium vel servitium amisit;* Tidd, 9th ed. 903; *id.* New Pr. 531; 2 Chit. Arch. 5th ed. 998, 999. Nor does the statute apply where the defendant *justifies* the assault and *battery*, (not the assault only), as by pleading son assault demesne, &c., *id.*; and consequently such special plea is not judicious in cases where the damages will probably be under 40*s*. and there is a doubt whether the justification can be sustained. It is competent to a judge to *certify* to *take away* costs under 43 Eliz. c. 6, in an action for an assault, battery, and imprisonment, where the damages are under 40*s*., if no actual battery be proved; 1 New R. 255; and even if a battery be proved, the judge may certify, with respect to the imprisonment, under 43 El., and though he cannot certify as to the battery; see Bone *v.* Dawe, 1 H. & W. 311; (*that* statute excepting "*battery*,") yet the plaintiff will not be entitled to full costs for that, unless the judge certify to *give* costs under 22 & 23 Car. 2; Wiffin *v.* Kincaird, 1 New R. 471. In an action of assault and battery with a *separate* count for false imprisonment, and damages under 40*s*., the judge may certify under 43 Eliz. to deprive plaintiff of costs; Briggs *v.* Bowgin, 2 Bing. 333; 9 Moore, 628, S. C.; Tidd, 9th ed. 953. Under the latter statute the judge may certify, though there be pleas of justification; *id.* In an action by husband and wife for an assault and battery, the defendant denied their *marriage*, and this was held not to be an admission of the battery to prevent the judge from certifying under 43 Eliz.; Wilson *v.* Lainson, 3 Bing. N. C. 307.

2. In trespass for an injury to or taking away *goods*, the plaintiff is entitled to costs without a certificate upon 22 & 23 Car. 2, although he recover less than 40*s*. damages: provided the trespass be a substantive and independent injury,—and not an act accompanying or aggravating, or laid or proved as a mode or qualification of an assault and battery or local trespass. Therefore in the case of a battery and tearing clothes, or assaulting and beating a horse on which plaintiff was riding, or breaking a close and impounding cattle, if damages be under 40*s*. the plaintiff loses his costs without a certificate; Tidd, 9th ed. 964, 965; 2 Ch. Arch. 5th ed. 998.

3. In trespass to *land*, &c. if the plaintiff recover less than 40*s*. damages, he has no more costs than damages, unless the judge certify "that the freehold or title of the land mentioned in the declaration was chiefly in question," 22 & 23 Car. 2, c. 9. This enactment does not apply, and the plaintiff, though he recover less than 40*s*. damages, is entitled to full costs without a certificate, where the defendant pleads in such a manner as to bring the freehold or title of the land in question *on the face of the record;* see Tidd, 9th ed. 963, 965; *id.* New Pr. 531; 2 Arch. by Ch. 5th ed. 999; and Littlewood *v.* Wilkinson, 9 Price, 314, (where defendant in trespass for breaking into a close and cutting trees, pleaded liberum tenementum;) or where it appears from the form of the pleadings that the freehold *could not* come in question; Tidd & Arch. *ub supra.* Therefore if the defendant in trespass, *q. c. fregit*, plead only not guilty, by which the plaintiff's title is not now denied; Hughes *v.* Hughes, 2 C. M. & R. 663; 1 Tyr. & G. 4 Dowl. P. C. 532; 1 Gale, 302, S. C.; Smith *v.* Edwards, 4 Dowl. P. C. 621; 1 H. & W. 497; *sed qu.* or a plea of license, &c.; see Wright *v.* Piggin, 2 Y. & J. 547; the plaintiff is entitled to full costs without a certificate though the damages be under 40*s*. Where in trespass for breaking and entering plaintiff's house and breaking open a door and lock and taking goods, the defendant pleaded, 1. not guilty; 2. except as to breaking the door and lock, a justification under a distress for rent, and the plaintiff joined issue, and obtained a verdict on the first plea with a farthing damages, and replied that the outer door was not open, &c. to the second plea, and was defeated thereon, it was held that the plaintiff was not entitled to costs without a certificate; Dunnage *v.* Kemble, 3 Bing. N. C. 538. This decision probably proceeded on the ground that the right of distress, and consequently the tenancy, might

ged and pulled about, kicked, wounded (*g*)] and ill-treated him, whereby (*h*) the †plaintiff became and was sick, sore, lame and disordered, and

have been contested under the plea of not guilty, by virtue of the 11 Geo. 2, c. 19, s. 21. In Howell *v.* Thomas, 7 C. & P. 342, the defendant pleaded to a declaration, *q. c. fregit*, 1. not guilty; 2. that the close *was not the plaintiff's close*. The plaintiff had a verdict, damages 1*s*. On an application by Chilton to the Court for a new trial, Mr. Baron Parke is stated to have intimated, "that on this verdict the plaintiff would be entitled to no more costs than damages." Whereupon Chilton abandoned his motion. In Hughes *v.* Hughes, *supra*, Mr. Baron Parke said "there is one case in which it might be a matter of doubt whether the freehold came in question—when there was a plea, that the close was not the close of the plaintiff." Assuming that this plea may and does put in issue a possessory right or interest, if not a freehold title, it may be doubtful whether such a plea does not bring the "*title*" in question *on the face of the record* within the rule adverted to. The influence which a *new assignment*, or the pleadings thereon, may have upon costs will be considered hereafter; *post*, 'Trespass—Pleas—New Assumpsit."

In an action of trespass for mesne profits, the plaintiff is not entitled to more costs than damages (the latter being under 40*s*.) unless the judge certify that the freehold came in question; Doe *v.* Davies, 6 T. R. 593.

By 8 & 9 Will. 3, c. 11, if the judge certify that the trespass was *wilful and malicious*, the plaintiff shall have full costs, though the verdict be for less than 40*s*.; see Tidd, 9th ed. 968; 2 Chit. Arch. 5th ed. 1000.

Where there are several defendants in trespass, if one obtain a verdict, he is entitled to his costs, whether he pleaded alone or jointly with the others, unless the judge certify that there was reasonable cause for making him defendant; 3 & 4 Will. 4, c. 42, s. 32; calculation of such costs, &c.; Griffiths *v.* Jones, 2 C. M. & R. 333; 1 Gale, 254, S. C.; Starling *v.* Cozens, 2 C. M. & R. 445; 2 Tyr. 757.

(*b*) See in general Bac. Ab. Assault; Com. Dig. Battery; Burn, J. Assault; 1 Selw. N. P. 27; 1 Chit. G. P. 37; 3 Bla. Com. 120. 1. *An assault* is an *attempt* with violence to do a person some bodily harm, as by holding up a fist, striking at another with a stick which does not touch the latter, or throwing any thing at a person which misses him, or by any similar act of inchoate violence, showing an intention to do injury, and the aggressor being within such a distance from the party assaulted that the intention might possibly be executed. The *quo animo* is material in the case of an assault, and therefore where a party half drew his sword, but said, "if it were not assize time I would run you through the body," it was held there was no assault, the words negativing an intention to do violence; 1 Mod. R. 3; Bac. Ab. Assault, A. The riding after a person and obliging him to run away into a garden, to avoid being beaten, is an assault; Morton *v.* Shoppee, 3 C. & P. 373. Mere words of abuse and threats do not constitute an assault; 1 Chit. G. P. 37. In *Stephens* v. *Myers*, 4 C. & P. 349, Tindal, C. J. said, "It is not every threat, when there is actually no personal violence, that constitutes an assault, there must in all cases be the means of carrying the threat into effect. The question I shall leave to you will be whether the defendant was advancing at the time in a threatening attitude to strike the chairman, so that his blow would have almost immediately reached the chairman if he had not been stopped, then, though he was not near enough at the time to have struck him, yet if he were advancing with that intent, I think it amounts to an assault in law. If he were so advancing, that within a second or two of time he would have reached the plaintiff it seems to me it is an assault in law. If you think he were not advancing to strike the plaintiff, then only can you find your verdict for defendant, otherwise you must find it for plaintiff and give him such damages as you think the nature of the case requires."

2. A *Battery* is any unlawful *touching* another by the aggressor himself with his hand or any instrument, or by his servant by his command, or by any substance put or continued in motion by him; 1 Chit. G. P. 37. If the injury arise from *inevitable* or unavoidable accident or necessity, and there be no want of care, no action lies; as if a horse being frightened, run away with the rider and hurt the plaintiff, or the injury arise from the accidental explosion of a gun, or in cutting wood with an axe, &c. But the act need not be *wilful* to maintain the action, nor is the degree of violence material; 3 East, 602; Sel. Bac. Ab &c., *ubi supra*. *Bruises* are where the skin is not broken.

3. A *wounding* consists in giving another a cut or even a scratch opening the flesh; 1 Chit. G. P. 38; or breaking the skin; Moriarty *v.* Brooks, 6 C. & P. 684.

4. A *Mayhem* is defined to be the deprivation of a member proper for defence in fight, and which are not only an arm, leg, finger, eye, and a fore tooth, but also some others; but not as it has been said a jaw tooth, or the ear, or a nose, because they have been supposed to be of no use in fighting; 3 Bla. C. 121.

so continued for a long time, to wit, thence hitherto, during all which time the plaintiff suffered great pain and was prevented from transacting his necessary affairs and business, and also thereby the plaintiff was obliged to incur, and did †then incur [*or* "to subject himself to liability to pay, and became liable to pay," (*i*)] great expenses, to wit, to the amount of £——, in and about the endeavoring to be cured of the injuries so sustained by him; and thereby also divers large quantities of blood which issued and flowed from the said wounds of the plaintiff, ran and flowed on the clothes and wearing apparel, to wit, one coat and one waistcoat, one pair of trowsers and one shirt of the plaintiff, wherewith the plaintiff was then clothed, of the value of £10, and greatly soiled and damaged and spoiled the same, so that the same thereby became of little or no use or value to the plaintiff, and other wrongs (*k*) to the plaintiff then did; against the peace (*l*) of our lady the queen, and to the damage of the plaintiff of £——; and therefore he brings his suit, &c.

### 2. *For riding against the Plaintiff.*

For that the defendant on [*&c.*], with force and arms and with a certain horse assaulted the plaintiff, and then rode [*or* "drove," *as the case may be,*] the said horse upon, against, and over the plaintiff, and then violently knocked him down to and upon the ground, and trod and trampled upon the plaintiff, and then with the said horse gave and struck the plaintiff divers blows, and kicked, bruised and wounded him, whereby, [*&c. conclude as in* Form 1.

### 3. *Declaration for False Imprisonment.*(*m*)

*Venue transitory, except in actions against constables, &c.*]—For that the

(*c*) The word "whereas" here would be demurrable; see *ante*, 713, note (*a*).

(*d*) The exact day is not material. "Made an *assault*" on divers days, would be bad on special demurrer; *aliter* it seems, if the allegation be "assaulted" on divers days; see English *v.* Purser, 6 East, 395. There should be a separate count for each distinct assault on several occasions on the same day, or different days. Upon one count for one assault, no second assault can be proved; see 1 Saund. 299, note 6; Stante *v.* Pricket, 1 Camp. 473.

(*e*) *Vi et armis* necessary; *ante*, 713, note (*a*).

(*f*) Under a count for an assault and battery, the former only may be proved; Bro. Ab. Trespass, pl. 40.

(*g*) Use only such of these words as are warranted by the fact; see *supra*, note (*b*).

(*h*) Adopt only so much of the following statement of damage as can be proved. In cases of slight assaults, without special damage, proceed at once to the *alia enormia*.

(*i*) These words are proper if the expenses were not *paid* before the action; see Pritchett *v.* Boevey, 1 C. & M. 775.

(*k*) The *alia enormia* does not appear to be an essential allegation. It is no part of the declaration, and no facts can be given in evidence under it, which might consistently with decency be stated in the declaration; Lowden *v.* Goodrick, Peake R. 46, 62; 3d ed. 64, 87. *Semble*, damages and matters naturally arising from the act complained of and stated, may be proved; Bull. N. P. 89; Holt, 699; 1 Stark. R. 98; 1 Ch. Pl. 6 ed. 397, 5 ed. 422.

(*l*) See *ante*, 713, note (*a*), as to *contra pacem*.

(*m*) What shall be deemed a false im-

defendant on the —— day of —— A. D. ——, with force and arms assaulted †the plaintiff, and then seized and laid hold of and beat the plaintiff, and with great force and violence pulled and dragged him about, (*s*) and also then imprisoned the plaintiff and kept and detained him in prison there for a long time, to wit, —— then following, [*or* then forced and compelled the plaintiff to go, and caused him to be forcibly conveyed in custody in and along divers public streets and highways to a certain *police-station*, and there imprisoned the plaintiff and kept and detained him in prison there without any reasonable or probable cause whatsoever, for a long space of time, to wit, for the space of —— then next following, at the expiration whereof the defendant forced the plaintiff to go, and caused him to be forcibly conveyed in custody to a certain *police-office*, and there again imprisoned the plaintiff for a long time, to wit, —— then following," *of course the above statement must depend on and be varied according to the facts,*] contrary to law [and under a false and unreasonable assertion, color and charge, that the plaintiff had committed an offence punishable by law, to wit, that he had committed felony, (*o*)] whereby the plaintiff was then not only greatly hurt, bruised and wounded, and suffered great anguish and pain of mind and body, and was prevented from attending to his lawful affairs, but was also thereby then greatly exposed and injured in his credit, reputation and circumstances, and was subjected and put to divers expenses, to wit, to the amount of £——, in order to obtain and in obtaining his liberation from the said imprisonment, (*p*) [*or* " in order to obtain his liberation from the said imprison-

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prisonment, see 1 Chit. G. P. 47; 2 Stark. Ev. 812, 2d ed.; 2 Selw. N. P. tit. Imprisonment; 3 Bla. Com. 127, 138. Bare words do not in general amount to an imprisonment. There must be some act whereby the plaintiff was deprived of his personal freedom for some portion of time, however short; there must be a laying hold of the person, or some actual restraint on submission without force; and in this instance actual laying on the hand is not necessary; 2 Stark. Ev. 2d ed. 812. If an officer or other person say, " You are my prisoner, &c." or state that he holds a warrant, and that the party must accompany him, and he submit, in either case there is a sufficient imprisonment; *id.* and note (*d*); Bull. N. P. 62; Pocock *v.* Moore, 1 Ry. & M. 321; Chinn *v.* Morris, 2 C. & P. 361; Bridgett *v.* Coyney, 1 M. & Ry. 211. Where upon a magistrate's warrant being shown to the plaintiff, he voluntarily and without compulsion attended the constable, held no imprisonment; Arrowsmith *v.* Mesurier, 2 N. R. 211. And in trespass for false imprisonment, proof must be given of circumstances from which the judge and jury may decide whether there was or was not a restraint or detention of the person; and it is not enough for witnesses to swear that they considered the plaintiff was in custody, and thought that he was under restraint, nor is it enough to show that the defendant at a police office stood before the plaintiff and said, " You cannot go away till the magistrate comes," if it appear that he relinquished that attitude and went to another part of the office before the plaintiff had made any attempt to depart; Cant *v.* Parsons, 6 C. & P. 504. An imprisonment includes an *assault*; but a *mere arrest* does not constitute a *battery;* see Stark. &c. *supra;* Selw. N. P. 8th ed. 905. The forcible detention of a party in the street against his will is an imprisonment; per Thorpe, C. J., 22 Ass. fol. 10, pl. 105.

(*s*) If the plaintiff were *handcuffed*, state the fact thus, " and then put certain handcuffs on the plaintiff's wrists, and handcuffed the plaintiff and kept him so handcuffed for a long time, to wit, —— hours then following;" see Wright *v.* Court, 4 B. & C. 596.

(*o*) See Bracegirdle *v.* Orford, 2 M. & Sel. 77.

(*p*) What costs recoverable as damages in trespass for an illegal arrest; Pritchett *v.* Boevey, 1 C. & M. 775. Form of allegation if plaintiff has not *paid* expenses; *ante*, 716, n. (*i*). No special damage not specifically laid, can be recovered as damages; see

ment was obliged to find and procure and did procure bail, to wit, E. F. and G. H., for his appearance before a justice of the peace to answer a certain false and unfounded charge then made against him by the plaintiff"]; and other wrongs, [*&c. conclude as in* Form 1.

### 4. *For Criminal Conversation.* (*q*)

For that the defendant on [*&c.*], and on divers other days and times between that day and the commencement of this suit, with force and arms assaulted ——, then and still being the wife of the plaintiff, and then debauched and carnally knew the said ——, whereby her affection for the plaintiff was alienated and destroyed, and he was and is deprived of, and hath wholly lost †the comfort, fellowship and society of his said wife, and of her aid and assistance in his domestic affairs, which he ought to have had and otherwise would have had, and other wrongs [*&c., conclude as ante*, 716, Form 1.

### 5. *For an Assault, &c. on the Plaintiff's Wife.*

For that the defendant, on [*&c.*], with force and arms assaulted ——, then and still being the wife of the plaintiff, and then beat, bruised, wounded and ill-treated the said ——, whereby the said ——, then became and was sick, sore and disordered, and so continued for a long time, to wit for the space of —— then next following, whereby the plaintiff during that period was deprived of the comfort, company and fellowship of his said wife, and of her aid and services in his domestic affairs, and the plaintiff during the said last-mentioned period did necessarily incur divers expenses, to wit, to the amount of £——, in and about the curing and nursing and taking care of his said wife upon the said occasion, and other wrongs [*conclude as ante*, 716, Form 1.

### 6. *By Husband and Wife for an Assault, &c. on the latter.*

For that the defendant on [*&c.*], with force and arms assaulted the said ——, then and still being the wife of the said A. B., and then beat, bruised, wounded and ill-treated her, whereby (*r*) she became and was sick, sore, lame and disordered, and so continued for a long time, to wit, —— then following, during which time she suffered great pain, and other wrongs [*&c. as in* Form 1, *ante*, 716, *concluding to the damage* "of the plaintiffs."

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Pettit *v.* Addington, Peake R. 62; see Selw. N. P. tit. "Consequential Damage," as to special damage; and *ante*, 716, n. (*k*).

(*q*) See form in *Case*, *ante*, 540.

(*r*) Care must be taken where the wife is joined as a plaintiff, not to state any thing which in law or fact is a damage to the husband only, as the loss of service, or expense; 1 Chit. Pl. 5th ed. 83 to 86, 6th ed. 73.

### 7. *For Debauching Plaintiff's Daughter.* (*s*)

For that the defendant on [*&c.*], and on divers days and times between that day and the commencement of this suit, with force and arms assaulted ——, then and still being the daughter and servant of the plaintiff, and then debauched [*&c. proceed as in* Form 1, *ante*, 571, *to the words* "incidental thereto," *and then conclude* "and other wrongs," &c. *as ante*, 716, Form 1.

## II. PERSONALTY. (*t*)

### 1. *De bonis asportatis.*

*Venue transitory.*]—For that the defendant on [*&c.*], with force and arms †seized and took certain goods and chattels of the plaintiff, to wit, —— (*u*) of great value, to wit, of the value of £——, ["and then knocked, cast and threw about and greatly broke, damaged, injured and destroyed the said goods and chattels"—*if the fact be so—or*] and carried away the same, and converted and disposed thereof to his own use, and other wrongs [*&c. ante*, 716, Form 1.

### 2. *For cutting a Rope, whereby Plaintiff's Boat was driven on Shore and damaged.*

For that the defendant on [*&c.*], with force and arms, &c. pulled up, cut in pieces, damaged and spoiled a certain rope, to wit, a graplin rope of the plaintiff of great value, to wit, of the value of £——, and with which a certain boat of the plaintiff, of great value, to wit, £——, then floating upon certain water there was then fastened and secured to the shore, by reason whereof the said boat then and there floated and was driven upon and against the shore and certain rocks and stones there, and was greatly damaged, shattered and spoiled, and the plaintiff was put to and incurred a great expense, to wit, £——, in and about the getting the said boat from and off the said shore, rocks and stones, and in and about the necessary repairing and amending thereof, which the same needed and required by reason of their having been so damaged and shattered and lost, and was deprived of the use of the said boat for a long time, to wit, —— weeks, and divers great profits which he would otherwise have acquired from the use of the boat, and other wrongs [*&c. conclude as in* Form 1, *ante*, 716.]

(*s*) See form in *Case* and law, *ante*, 570, Form 1.

(*t*) Other forms for chasing cattle, shooting dog, &c.; 2 Chit. Pl. 5th ed. 858, 860, 6th ed. 610, 611.

(*u*) Describe them as in trover, *ante*, 664, *id.* note (*d*).

3. *Trespass for removing a Tombstone, and erasing the Inscription.* (*x*)

## III. REALTY.

1. *For Trespasses in Plaintiff's Dwelling-house, and seizing Goods therein.* (*y*)

*Venue local.*]—For that the defendant on the —— day of —— A. D. ——, and on divers other days and times between that day and the commencement of this suit, (*z*) with force and arms, broke and entered a certain *dwelling-house* †of the plaintiff, situate [No. ——, in —— street, (*a*)] in the parish of ——, in the county aforesaid, and then made a great noise and disturbance therein, and continued therein making such noise and disturbance for a long time, to wit, for the space of ——, then next following, and then forced and broke open, broke to pieces and damaged divers, to wit, —— doors of the plaintiff of and belonging to the said dwelling-house, and broke to pieces, damaged and spoiled divers, to wit, —— locks, —— staples, and —— hinges of and belonging to the said doors respectively, and of great value, to wit, £——, [and also then and there pulled down, prostrated and destroyed divers parts of the walls and partitions and ceilings and other parts of the said dwelling-house, and also then pulled down, tore away, severed, detached and removed certain fixtures and things of the plaintiff, to wit, —— of great value, to wit, £——, then affixed to and parcel of the said dwelling-house (*b*)]; and also during the time aforesaid, to wit, on the said —— day of —— A. D. —— with force and arms, seized and took divers goods and chattels, to wit, [*describe the goods as in trover, see ante*, 664, note (*d*)] of the plaintiff, then being in the said dwelling-house, and being of great value, to wit, of

(*x*) See Spooner *v.* Brewster, 3 Bing. 136.

(*y*) Forms, &c. 2 Chit. Pl. 5th ed. 863, 6th ed. 614; forcible entry, &c.; *id.* 865, 615. Form of declaration for erecting a building on plaintiff's wall, whereby the light was obstructed; Wells *v.* Oddy, 2 C. M. & R. 128.

(*z*) This is called laying the trespasses with a *continuando*, and various trespasses at different times during the interval mentioned may be proved. The first day laid should be that when the first trespass occurred, or *before*, because the plaintiff would not be permitted to give in evidence *repeated acts* of trespass, unless committed during the space of time laid in his declaration. Where a particular space of time is assigned by a *continuando* for the torts, it seems to become matter of *description*, and not a mere formal allegation of time; but the *continuando* may be waived and *one* trespass, even *before* the first day laid, may be proved, for a *continuando* ought not to place the plaintiff in a worse situation than if one trespass only were laid; Hume *v.* Oldacre, 1 Stark. R. 351; 1 Chit. Pl. 5th ed. 289, 438, 6th ed. 394.

(*a*) It is not unusual to give a specific description of the locality of a house in trespass, but it would seem that the New Rules (see *post*, 721, note (*g*), do not require so particular a description of a *house*. What comprised in the term messuage, *ante*, 469, note (*o*). Variance; Mudie *v.* Bell, 3 C. & P. 331.

(*b*) See Twigg *v.* Potts, 1 C. M. & R. 89.

ber, —— cart loads of wood, —— cart loads of branches, and —— cart loads of bushes of the plaintiff, of great value, to wit, of the value of £——, took and carried away, and converted and disposed thereof to his own use; and by reason of the several premises, the said close of the plaintiff became and was and is much impoverished and injured and deteriorated in value; and other wrongs [*&c. conclude as in* Form 1, *ante*, 716.

### 4. *For breaking up a Railroad, and making a Tramroad across the same.*

For that the defendants heretofore, to wit, on [*&c.*], and on divers other days and times between that day and the commencement of this suit, with force and arms broke and entered divers, to wit, two closes, that is to say, one close of the plaintiff called the ——-railroad, and one other close of the plaintiff, abutting on the north and south ends thereof respectively on a certain railroad or way, on the east on ——, and on the west on ——, and which said last-mentioned close was formerly used as a railroad or railway, the said closes of the plaintiff being situate in the said county of ——, to wit, in the parish of ——, and then and there, with feet in walking, trod down, trampled upon, consumed and spoiled the grass of the said plaintiff of great value, to wit, of the value of £——, there then growing and being; and also then and there tore up, prostrated and destroyed a great part, to wit, †200 feet of the roads, and 200 feet of the paths of the plaintiffs, being part and parcel of and belonging to the said closes respectively, and the materials thereof coming, that is to say, 100 tons of iron, 100 tons of earth, and 100 tons of rubbish, of great value, to wit, of the value of £100, seized, took and carried away and converted and disposed thereof to their own use; and also then and there cut, dug and made in and upon the said closes respectively, divers excavations, roads and paths, that is to say, five excavations, five roads and five paths, of great length and breadth respectively, that is to say, of the length of 100 yards, and of the breadth of ten yards respectively, and also then and there put, placed and laid, and caused to be put, placed and laid, divers large quantities, to wit, 100 tons weight of iron, 100 tons weight of stones, 100 cart loads of earth and 100 cart loads of rubbish, in and upon the said closes of the plaintiff respectively, and kept and continued the same so there put, placed and laid, without the leave or license and against the will of the plaintiff, for a long time, to wit, from the day and year first aforesaid hitherto, and thereby and therewith during all the time aforesaid greatly incumbered the said closes respectively, and hindered and prevented the said plaintiff from having the use, benefit and enjoyment thereof in so large and ample a manner as he might and otherwise would have had; and other wrongs [*&c. conclude as ante*, 716, Form 1.

## 6. *Declaration in Trespass for Mesne Profits and Costs of Ejectment.* (*h*)

*Commencement as ante*, 1.]—For that the defendant heretofore, to wit, on the —— day of —— A. D. ——, (*i*) with force and arms broke and entered divers, to wit, —— messuages [*&c.*] (*k*) of the plaintiff, situate in the parish of —— in the county aforesaid, and then ejected, expelled, put out and amoved the plaintiff from his possession and occupation thereof, and kept and continued him so expelled and amoved for a long time, to wit, †from the day and year aforesaid, until and upon the —— day of —— A. D. —— [*the day on which possession was obtained*]; and during that time took and had and received to the use of him the defendant all the issues and profits of the said tenements, being of great yearly value, to wit, of the value of £—— (*l*); whereby the plaintiff during all the time aforesaid, not only lost the issues and profits of the said tenements with the appurtenances, but was deprived of the use and means of repairing and cultivating the same, and necessarily incurred divers expenses, to wit, to the amount of £——, in and about the recovering of the possession of the said tenements with the appurtenances; and other wrongs [*&c. conclusion as ante*, 716, Form 1.

(*h*) See Form, &c. 2 Chit. Pl. 5th ed. 870, 6th ed. 619; 1 *id.* 193. See in general, Ad. Ej. 3d ed. 379. An action of trespass in the above form is the usual remedy by a landlord or other owner of land, after a recovery in ejectment, to obtain the rent or compensation for occupation from the time the party *wrongfully* held possession until possession was regained, together with damages for any *waste* committed (if charged in the declaration) and the costs of the ejectment. Where there is judgment by default in ejectment, the plaintiff may, in trespass for mesne profits, recover all the expenses he has been necessarily put to in the ejectment, and is not limited to the taxed costs as between party and party; Doe *v.* Huddart, 2 C. M. & R. 316. The action is to be brought against the party actually withholding possession, and it is said to be doubtful whether it lies against a tenant for the holding over of his undertenants; Burne *v.* Richardson, 4 Taunt. 720; Adams Ej. 383. The action may be in the name of John Doe (but then security for costs may be required), or of the lessor of the plaintiff. As to costs; see *ante*, 715, note (*a*). As to evidence, see Ad. Ej. 389 to 393; 2 Stark. Ev. 311, 2d ed.; Doe *v.* Huddart, 2 C. M. & R. 316.

(*i*) This is usually the day of ouster laid in the declaration in ejectment, but is not necessarily so, and an earlier day to meet the facts may be laid.

(*k*) The premises are usually described as in the declaration in ejectment, in which judgment was obtained. But under the New Rules it seems necessary to describe each *close* by name or abuttals, as *ante* 721, Form 5; see *Pleas, post.*

(*l*) If the defendant committed waste or injury, here state it; see the preceding forms.

# TRESPASS—PLEAS, &c. IN.

## OBSERVATIONS ON THE PLEA OF NOT GUILTY IN TRESPASS.

The general issue, or plea of not guilty, in *trespass*, had, even before the New Rules on pleading were framed, a much less extensive operation in reference to the matters which it put in issue, than belonged to the general issue in some of the other forms of actions, especially assumpsit and case. In general it merely denied that the defendant did the act complained of, and all matters *in confession and avoidance*, or in *justification* or *discharge*, were then, as at present, required to be pleaded specially; see 1 Chit. Pl. 5th ed. 538, 6th ed. 500 to 507.

It will therefore be observed, that the New Rules contain no provision in regard to the plea of *not guilty* in actions of trespass for an assault, &c., or other injury to the *person*. With respect to the plea of not guilty in trespass for injuries to *real property* or *goods*, the New Rules alter the former effect of that plea as a denial of the plaintiff's property or title to and possession of the tenements or goods. They provide—

"2. In actions of trespass *quare clausum fregit* the plea of not guilty shall operate as a *denial* that the defendant committed *the trespass alleged in the place mentioned*, but not as a denial of the plaintiff's *possession* or *right of possession* of that place; which, if intended to be denied, must be traversed specially."

"3. In actions of trespass *de bonis asportatis* the plea of not guilty shall operate as a *denial* of the defendant having committed the trespass alleged by taking or damaging the goods mentioned, but not of the plaintiff's *property therein*."

The provisions of the New Rules in regard to pleas of rights of *Way* or *Common*, and other similar rights, will be considered hereafter.

Not guilty raises a separate issue as to *each* count; 1 Dowl. P. C. 572, 736; 4 *id.* 603.

## GENERAL FORMS OF PLEAS, &c.

### 1. *Not Guilty.*(a)

The defendant, by —— his attorney, [*or* "in person,"] says that he is

(a) See general observation, *supra*.

not †[*if there be several defendants who plead jointly, state* "that they are not, nor is either of them,"] guilty of the said supposed trespasses (*a*) above laid to his ["their"] charge, or either of them or any part thereof in manner and form (*b*) as the plaintiff hath above thereof complained against him ["them"]; and of this the defendant puts himself ["defendants put themselves"] upon the country, &c.

## 2. *Not Guilty to part of the Trespasses.*

And the defendant, by —— his attorney, as to the said supposed ["assaulting, beating," &c.—*or*, "breaking and entering the said close in which, &c. and," &c.—*or* "seizing and taking the said," &c.—*enumerating the particular trespasses which are denied,*] saith that he is not guilty of the said last mentioned several trespasses, or of either of them, or any part thereof in manner [*as before*]; and as to the residue of the said supposed trespasses in the declaration mentioned, the defendant says that [*&c.*]

## 3. *Accord and Satisfaction.*

[*The form will be as in Case, ante*, 619, using the word "trespasses" instead of "grievances."]

## 4. *License.*(*c*)

And for a further plea in this behalf the defendant says, [*or if the plea be to part only of the trespasses, state* "and for a further plea as to the breaking" *&c. enumerating the licensed trespasses*] the defendant says that the plaintiff ought not to maintain his aforesaid action thereof against him, because he says,] that he, the defendant, at the said times when, &c. by the leave and license of the plaintiff to him for that purpose first given and granted, committed the trespasses in the said declaration mentioned [*or*, "the trespasses in the introductory part of this plea mentioned"] and this the defendant is ready to verify. [*Add prayer of judgment if the plea be to part.*

## 5. *Replication to a Plea of License.*(*d*)

(*a*) See general observations, *ante*, 725.

(*b*) Declaration for assault, battery and tearing clothes. Plea, that defendant was not guilty of the supposed "assaults" in manner and form as the plaintiff complained. Held, after verdict, that the *modo et formâ* included a denial of the battery and laceravit as well as the assault; Wetherell *v.* Howard, 3 Bing. 135; 10 Moore, 502.

(*c*) See next note, and 3 Harr. Ind. 2089, Trespass, 5.

(*d*) Where there are several trespasses laid in the declaration, and the defendant pleads license, it seems that he must prove a license commensurate with and covering all the trespasses proved upon the declaration, and will fail as to such as are not shown to have been licensed, and that in

### 6. *Limitations, Plea of the Statute of.*

[The form is precisely as in *Case, ante,* 643, observing that by statute 21 Jac. 1, c. 16, s. 3, the period of limitation in actions of trespass for assault, battery, wounding or imprisonment, is *four* years, and in other actions of trespass *six* years, after the cause of action accrued. In actions against justices, constables, excise officers, and others, the limitation is shorter; see Tidd, 9th ed. 19; 2 Harr. Ind. tit. "Limitation."]

### 7. *Payment into Court.*

[The form will be as *ante,* 369. Money may, *by leave* of the Court or a judge, be paid into Court in *trespass, except* in actions for assault and battery, false imprisonment, crim. con. or seduction; see *ante,* 651. It is often judicious to pay money into Court to *part* of the trespasses which cannot clearly be justified; and the plea may be thus: "And as to the breaking and entering the said [*&c.*], [*or,* "as to the seizing and taking the said" *or if, as is usual, the other trespasses have been specifically enumerated and pleaded to, say,* "And as to the *residue* of the trespasses in the declaration mentioned,"] the defendant says, that the plaintiff ought not further to maintain his action, because the defendant now brings into Court the *sum of £—— ready to be paid to the plaintiff,* and the defendant further says, that the plaintiff *has not sustained* damages to a greater amount than the said sum of £—— in respect of the causes of action in the introductory part of this plea mentioned; and this the defendant is ready to verify, wherefore he prays judgment if the plaintiff ought further to maintain his action as to the last mentioned causes of action."]

### 8. *Tender of Amends.*

[In many cases of torts a tender of sufficient amends before writ is *by statute* a good defence to an action; as in the case of magistrates, &c. sued for acts done in the execution of their office, &c.; see 24 Geo. 2, c. 44, s. 2. Form of plea in such case; 3 Chit. Pl. 5th ed. 1065, 6th ed. 974. The like by an excise officer; *id.* 1063, 973. Form of plea of tender of amends in an action for an irregular *distress, ante,* 627, Form 6. Form in an action on the case against a *railway company* for injuring

such case a new *assignment* is not necessary; Barnes *v.* Hunt, 11 East, 451; Hayward *v.* Grant, 1 C. & P. 448. And in general a replication or new assignment of *excess* is not necessary; Symons *v.* Hearson, 12 Price, 369. It seems that where there has been a *revocation* of the license before the trespass, it should be replied; see 1 Saund. 300 a, 2 *id.* 5, note 3. A replication to a plea of license denying it, should not, it seems, be *de injuriâ,* in the common form; but "that defendant at the said times, when, &c. of his own wrong, and *without the lease and license* of the plaintiff to him the defendant first given and granted, committed" [*&c. as post,* 729, Form 9.

plaintiff's land, *ante*, 657; see *id.* note as to payment of money into Court upon the plea of tender. †Plea in trespass to land, *disclaimer* of title and tender of amends; 3 Chit. Pl. 5th ed. 1066, 6th ed. 975. The like and replication; Williams *v.* Price, 3 B. & Ad. 695.]

### 9. *Replication De Injuria sua propria absque tali causa, in Trespass.* (*e*)

And the plaintiff, as to the said —— plea, saith, that the defendant, at the said time when, &c. [*or* "times when, &c." *if several days or times*

(*e*) The general replication *de injuria*, as it is termed, is, when appropriate, an advantageous form of reply for a plaintiff where he has no *new matter* to produce in answer to the plea, and rests his case upon a denial of the defendant's allegations. It amounts to a general traverse of *all* the material matters of fact in the plea constituting the *cause* or point of justification; it puts in issue the *whole* cause; see Kerbey *v.* Denby, 1 M. & W. 336; Penn *v.* Ward, 2 C. M. & R. 338. See in general the observations of the Court in the late cases deciding *de injuria* to be a good replication in *assumpsit* where the plea consists of matter of excuse; and Steph. 3d ed. 163.

The leading authority upon this form of replication is Crogate's case, 8 Co. R. 67. See comments, &c. thereon, per Tindal, C. J. in Bardons *v.* Selby, 1 C. & M. 500; 3 Tyr. 430; 3 B. & Ad. 2; 9 Bing. 756, S. C. In Crogate's case the defendant, in an action of trespass for driving the cattle of the plaintiffs, pleaded a right of *common* in a copyholder over the *locus in quo*, by prescribing in the usual way in the name of the lord of the manor, and because the plaintiff had wrongfully turned his cattle there, the defendant, as servant of the copyholder, and by his command, justified driving the cattle out. To this plea the plaintiff replied *de injuria propria absque tali causa*, and upon demurrer it was adjudged that the general replication in that case was insufficient; and Lord Coke then proceeds to lay down *four* resolutions of the Court, in the course of which he thus states the nature of this general plea, viz. the general plea *de injuria sua propria*, &c. is proper when the defendant's plea doth consist merely *of matter of excuse* and of no matter of *interest* whatever. The resolutions of the Court are these *four*—*first*, that *absque tali causa* doth refer to the *whole plea*, and not only to the commandment, for all makes but one cause, and any of them without the other is no plea by itself; *secondly*, it was resolved, that when the defendant in his own right, or as servant of another, claims any *interest* in the land, or to any common or rent going out of the land, &c. there *de injuria sua propria*, &c. generally is no plea, but if the defendant justifies as servant, there *de injuria sua propria*, &c. in some of the cases with a traverse of the commandment, that being made material, is good; *thirdly*, it was resolved, that when by the defendant's plea any *authority or power* is mediately or immediately *derived from the plaintiff*, there, although no interest be claimed, the plaintiff ought to answer and shall not reply generally *de injuria sua propria*. The same law of an authority given by law as to view waste, &c. *Lastly*, it is resolved, that in the case at bar the issue would be full of multiplicity of matter where an issue ought to be full and single for parcel of the manor demisable by copy grant, by copy prescription of common, &c. and commandment will be all parcel of the same.

The general traverse *de injuria* is applicable (we have seen) in *assumpsit*, and other forms of action (including replevin, Bardons *v.* Selby, *ubi supra*,) where the plea is founded on matter of *excuse*, and does not fall within either of the other exceptions laid down in Crogate's case. In *trespass to persons* it is a good answer to a plea of son assault demesne, or other justification not founded on process out of a Court of *record* (Crogate's case); or justifying in defence of property, to which a *title* and not mere possession is shown; Vivian *v.* Jenkin, 3 Ad. & E. 741. In trespass to *goods*, *de injuria* generally will not be a good replication, where the plea justifies under a *fieri facias*, &c. out of a Court of *record*, or the removal of goods from land to which a *title* is shown; but it suffices where the plea justifies the seizure under a magistrate's warrant for a poor's rate; Bardons *v.* Selby, *supra;* and in most cases where no *property* is claimed in the goods *anterior* to the seizure and the defence is matter of excuse.

In trespass to *land*, *de injuria* generally is a bad replication (on general demurrer) where the defendant claims an *interest* in the land or a title thereto, or a right of way or common, &c. or justifies an entry

*be laid †in the declaration,*] of his own wrong and *without the cause (f)* by him in his said —— plea alleged, committed the said trespasses in the

thereon to distrain for rent; Hooker *v.* Nye, 1 C. M. & R. 258; 4 Tyr. 777; or under process of a court of record.

In all these cases the circumstance of the defendant justifying as *servant* of a third person does not prevent the plaintiff from replying *de injuria* generally; see Piggott *v.* Kemp, 1 C. & M. 197; Bardons *v.* Selby, *supra*.

It is frequently advantageous and proper to *admit* certain parts of the plea (which prevent the plaintiff from replying *de injuria* generally), as the process and warrant; the judgment stated to have been obtained; the fiat in bankruptcy alleged to have been issued; or the seisin in fee, &c.; (where these are not matters which the plaintiff cares to admit,) and reply *de injuriâ*, &c. as to the *residue* of the cause, &c.; see an instance and form, *post*, 747. But where the *cause* of excuse stated in the plea is true, the plaintiff cannot safely reply *de injuriâ*, and must, where he relies on an *excess*, or trespass committed at *another* time, in general reply or new assign such excess or other trespass; see Penn *v.* Ward, 2 C. M. & R. 338; 1 Gale, 189, S. C.; and see *post*, 731, n. (*l*). The case of Price *v.* Peek and others, 1 Bing. N. C. 380; 5 M. & Sc. 205, clearly explains this principle. That was an action of trespass against bailiff and sheriff for taking the plaintiff on a charge of felony to a police station, and *thence to a prison*. The sheriff, after pleading not guilty, justified the taking *from the police station* to the prison under a *ca. sa.* The plaintiff, admitting the writ and the delivery of the warrant to the bailiff, replied *de injuriâ absque residuo causæ*. Held, that under this replication he could not give evidence to involve the sheriff in the misconduct of the bailiff, *committed before the plaintiff arrived at the police station*, (namely, the charging the plaintiff with felony, and having him detained on that charge); and that in order to the admission of such evidence, the circumstances should have been *replied or new assigned specially*. Tindal, C. J. in delivering judgment, said, "the traverse, *de injuriâ suâ propriâ absque residuo causæ*, puts nothing in issue but each and every fact alleged in the special plea, and not admitted in the replication. In this case it puts nothing in issue but whether the assault and imprisonment mentioned in the plea were committed under color of the writ and warrant or not. It is true that under the authority of the case of Lucas *v.* Nockells, 10 Bing. 155, the plaintiff may show under that traverse that the sheriff did not act under the writ at all; that although he had it in his possession, he acted at the time for a purpose and with an object entirely distinct from the execution of the writ, and that he only avails himself of it at the trial as an excuse for an illegal act. But there is no authority in that case, or any other, that where the sheriff has really acted under the writ at the time, and avails himself of it in his plea, the plaintiff shall be at liberty under this replication to give antecedent matter in evidence to render the subsequent arrest under the writ illegal. Such a reply, as it appears to us, confesses the arrest stated in the plea to have been made under the writ, but avoids it by new matter of fact; and therefore, like any other matter of confession and avoidance, must be specially pleaded. It is well established, that where the plaintiff seeks to avoid any legal excuse for a trespass, by showing matter subsequent, which makes the defendant a trespasser *ab initio*, he is bound to plead such matter, and cannot take advantage of it under the general traverse, *de injuriâ*, &c.; see the authorities collected in 1 Saund. 300 d, in note; and the case appears to us to be the same upon principle, whether the act done by the defendant is precedent or subsequent to the execution of the writ, and the reason is undoubtedly the same in each case, viz. that the defendant ought not to be taken by surprise at the trial."

Declaration of two counts for assault and imprisonment. Plea, that defendant being bail for plaintiff, arrested him to render him in discharge, and detained him till he had satisfied the demand in the action. Replication *de injuriâ*. It appeared that defendant in addition to detaining plaintiff till he satisfied the demand in the action, detained him *an hour longer*, till he paid the expenses of the defendant becoming bail, &c. Held, that this was *one continuing trespass*, and that therefore, in order to recover *for that part of it* which was unjustifiable, (namely, the additional detention for the bail's expenses) the plaintiff ought to have *newly assigned;* Lambert *v.* Hodgson, 1 Bing. 317; 8 Moore, 326. But, where there are two *distinct* assaults, &c., and a count for *each;* and one assault is open to a justification, the other not; if the defendant plead a justification to one count, the plaintiff should enter a *nolle prosequi* upon one count, or if he disputo the justification should reply *de injuriâ*, &c.; and must not new assign: he should proceed for the other trespass on his other count; see Atkinson *v.* Matteson, 2 T. R. 172, 177; 1 Saund. 299, n. 6.

But in general a new assignment is unnecessary, and *de injuriâ* suffices when the defendant cannot prove the whole of the facts he pleads to the several trespasses he professes to justify, and which constitute

said declaration †mentioned, in manner and form as the plaintiff hath above thereof complained; and this the plaintiff prays may be inquired of by the country, &c.

### 10. *New Assignment of another Trespass:—General Form of, in Trespass. (g)*

And as to the said —— plea, the plaintiff saith, that he commenced his said action, and declared as aforesaid, not for the trespasses in that plea mentioned, but for that the defendant on the said —— day of —— A. D. ——, with force and arms, upon another and different occasion, and for another and different purpose than the occasion and purpose in the said —— plea mentioned, committed the trespasses in the said declaration mentioned, as the plaintiff hath therein complained, being other trespasses than those in the said —— plea mentioned; and this the plaintiff is ready to verify, wherefore he prays judgment, and his damages by him sustained on occasion of the committing of the trespasses above newly assigned to be adjudged to him.

[*Counsel's signature.*]

## I. TO THE PERSON.

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the *substance* of his defence to those trespasses; see *post*, 732, n. (*m*).

Thus in a plea, to a declaration for breaking and entering, assaulting, &c. justifying an entry and arrest under a *ca. sa.*, the averment of *the outer door being open* is necessary and material; and is well traversed under the replication of *de injuriâ absque residuo causæ*, and the defendant will fail if that fact be negatived, although the rest of the plea be supported by the evidence; Kerby *v.* Denby, 1 M. & W. 336.

Where *de injuriâ* is *inadmissible* by reason of the plea claiming an interest in land, &c. the replying it has been held to be a defect in substance, so that a demurrer thereto may be *general*; Hooker *v.* Nye, *ubi supra*; see 1 Chit. Pl. 6th ed. 610. The error would be cured by verdict; *id.* It is usual to demur specially in this instance.

A replication *de injuriâ* in trespass, with a new assignment that the defendant committed the trespasses with more violence and in a greater degree than was necessary for the purposes in the plea mentioned, is specially demurrable for duplicity; Thomas *v.* Marsh, 5 C. & P. 596; Gisborne *v.* Wyatt, 1 Gale, 35; 3 Dowl. P. C. 505, S. C.; see *ante*, 39, Form 2, and note (*c*).

(*f*) The word "cause" suffices, though several facts are stated in the plea and put in issue. Sometimes the plaintiff replies *de injuriâ* in one replication to several pleas of justification, and in this instance state "without the causes by him in his said —— and —— pleas respectively alleged, or either of them, &c., committed the several trespasses in the introductory parts of those pleas mentioned," &c.

(*g*) See Form 3 and note, *post*, 731 and 729, n. Pleadings and costs on a new assignment, *post*, "Trespass to Realty," "New Assignment."

## NOT GUILTY. (k)

### 1. *Conviction, &c. for the Assault before Magistrates.*

[See Form on 9 Geo. 4, c. 31, ss. 27, 28, 3 Chit. Pl. 5th ed. 1073, 6th ed. 980. Aver, in using that Form, "that the said assault and battery in the declaration mentioned were a common assault and battery within the †meaning of the said act." In Harding *v.* King, 6 C. & P. 427, it was held that the defence that the magistrates gave a certificate dismissing a summons for the assault must be pleaded specially.]

## DEFENCE OF THE PERSON.

### 1. *Son Assault Demesne.* (i)

And for a further plea in this behalf, (*k*) the defendant says, that the plaintiff, just before the said time when, &c. to wit, on the day and year in the declaration mentioned, with force and arms made an assault upon the defendant, and would then have beat and otherwise illtreated the defendant, if he had not immediately defended himself against the plaintiff, wherefore he the defendant did then defend himself against the plaintiff, as he lawfully might for the cause aforesaid, and in so doing did ne-

(*k*) See the Forms 1, 2, *ante*, 725, and observations thereon. In trespass to persons, not guilty would only deny the *fact* of the defendant having done or caused the act complained of; see Boss *v.* Litton, 5 C. & P. 407; Goodman *v.* Taylor, *id.* 410; 1 Chit. Pl. 6th ed. 501; Pearcy *v.* Walter, 6 C. & P. 232; inevitable accident, *id.* Plea in Case, that plaintiff's carelessness as much as defendant's caused defendant to ride or drive against him; see *ante*, 621, Form 2. A plea in *case* that plaintiff's carelessness, without *any* on defendant's part in driving, &c. is bad on demurrer, as amounting to not guilty; Gough *v.* Bryan, 5 Dowl. P. C. 765; 2 M. & W. 770, S. C.

A person who is a *primâ facie* trespasser must justify specially; Bryant *v.* Clutton, 1 M. & W. 408. The Chancellor, sued in trespass for committing a solicitor to a *fiat* for not obeying an order, need plead only not guilty; Dicas *v.* Lord Brougham, 6 C. & P. 249.

(*i*) See forms, Steph 3d. ed. 163; 3 Chit. Pl. 5th ed. 1067, 6th ed. 976, and notes; Com. Dig. Pleader, 3 M. 15; 1 Saund. 296, note. A *wounding* may be justified in *self* defence: but in defence of the possession of *property* the plea must be only *molliter manus imposuit*, unless there be resistance, &c. on the plaintiff's part; *id.* In general it is not advisable to *justify* as above admitting a battery, on account of *costs*, (see *ante*, 713, note (*a*)), unless there be a tolerably clear ground of defence.

(*k*) If the plea be pleaded to part only of the declaration, it must be here confined accordingly. Where there are several assaults, there should be a separate plea of *son assault demesne* to each count, if each assault be justified in self-defence. Declaration, that defendant assaulted plaintiff, and wrenched a stick from his hands, and with the said stick and with his fists gave the plaintiff blows, &c. Plea, as to the assaulting the plaintiff with the stick and with his fists giving him blows, &c. *son assault demesne*. Held, after verdict, that the plea sufficiently justified the battery with the stick as well as the assault; Blunt *v.* Beaumont, 2 C. M. & R. 412.

cessarily and unavoidably commit the several supposed trespasses in the declaration mentioned; and this the defendant is ready to verify.

### 2. *Replication thereto, De Injuriâ.*

[See Form, *ante*, 728: but reply *excessive* violence as in next form, where it can be established, and the defendant may probably be able to prove that the plaintiff began the affray. As to the new assigning, see *ante*, 729, note (*e*); *infra*, Form 3, and note (*l*).]

### 3. *Replication of Excess, to a Plea of son Assault Demesne.* (*l*)

And as to the said [second] plea, the plaintiff saith, that the defendant, at the said time when, &c. of his own wrong committed the trespasses in the said declaration mentioned to a greater degree and extent, and with more force and violence than was necessary for the purpose in the said [second] †plea mentioned, in manner and form as the plaintiff hath above complained; and this the plaintiff is ready to verify.

## DEFENCE OF THE POSSESSION OF PERSONALTY.

### *Justification of an Assault, &c. in resisting a rescue of Cattle, distrained damage feasant.*

And for a further plea in this behalf, the defendant says that at the time of the distress hereinafter mentioned, the defendant was lawfully possessed of a certain close called ——, situate in the parish of —— in the county of ——, and that before the said time, when, &c., to wit, on the day and year in the declaration mentioned, divers cattle, to wit, one gelding and one mare, were in the said close doing damage there; wherefore defendant, before the said time when, &c., to wit, on the day and year aforesaid, took the said cattle in the said close so doing damage there in the name of a distress, and drove the same cattle out of the same close towards the common pound there, to wit, in the county of —— aforesaid, in order to impound the said cattle therein as a distress for the damage so by them done in the said close; and defendant further says, that whilst he was driving the said cattle so distrained towards the said common pound, and before the said cattle were impounded therein, to

(*l*) Where the plaintiff does not proceed for a totally *different* trespass to that attempted to be justified, but contends that the defendant, though justified to some extent, was guilty of *excess*, he should not reply *de injuriâ* or new assign, but *reply* as above; see form and rejoinder, Bone *v.* Daw, 3 Ad. & E. 711; and observations of Patteson, J. *id.*; Penn *v.* Ward, 2 C. M. & R. 338; 1 Gale, 109. Costs in such case, if the damages are under 40*s.*; Bone *v.* Daw, *ante*, 713, note (a).

wit, at the said time when, &c., the plaintiff, with force and arms, &c., and with a strong hand, did endeavor, as much as in him lay, to rescue and take the said cattle so distrained as aforesaid out of the custody and possession of the defendant, against the will of the defendant; whereupon the defendant did then and there, for the preservation of the said distress and in defence of his possession thereof, gently lay his hands on the plaintiff and did resist and oppose the plaintiff in order to prevent him from rescuing the said distress, as it was lawful for him the defendant to do, which are the supposed trespasses in the introductory part of this plea mentioned, and whereof the plaintiff hath above complained against the defendant; and this he is ready to verify, &c.

## DEFENCE OF A HOUSE, &c. (*m*).

1. *Plea to a Declaration for an Assault and Battery, that they were committed by Defendant as Servant of the Occupier of a House, to expel Plaintiff, showing he resisted and assaulted the Defendant.* (*n*)

And for a further plea in this behalf, the defendant saith that one J. E. before and at the said time, when, &c., was *possessed* of a certain dwel-

(*m*) In pleas of this kind care must be taken that the cause or ground of justification warrants or covers all the trespasses charged in the declaration, to which the plea is pleaded; and the defendant must, on a replication *de injuria*, prove all the facts laid in his plea, which are necessary to support the whole justification alleged. Therefore, where the declaration complained of an assault, putting the plaintiff out of a shop and imprisoning him in custody of a police officer, and the plea was *molliter manus imposuit* to remove the plaintiff from the defendant's shop, and a justification of the imprisonment because the plaintiff had *assaulted* the defendant, and the assault on the defendant was not proved by him, it was held, that although without it the first part of the plea was sustainable, yet, being a material allegation to maintain the plea as to the imprisonment, it was necessary to prove it, on a replication *de injuriâ*, to entitle the defendant to a verdict; Reece *v.* Taylor, 4 N. & M. 470; 1 H. & W. 15, S. C.; see Bone *v.* Daw, 3 Ad. & E. 711, cited *ante*, 714, note (*a*). Trespass for assault and false imprisonment, &c.: Plea, that the defendant was possessed of a dwelling-house, and that the plaintiff entered it, and insulted, abused and ill-treated the defendant and his servants, and greatly disturbed them in the possession thereof, in breach of the peace; whereupon the defendant requested the plaintiff to cease his disturbance and to depart from the house, which the plaintiff refused to do, and continued making the said disturbance and affray therein, that thereupon the defendant, in order to preserve the peace and restore good order in the house, gave charge of the plaintiff to a certain policeman, and requested him to take the plaintiff into custody, which the policeman did. It appeared in evidence that the plaintiff entered the defendant's shop to purchase an article in the shop, when a dispute arose between the plaintiff and the defendant's shopman, that the plaintiff refusing on request to go out of the shop the shopman endeavored to turn him out and an affray ensued between them, that the defendant came into the shop during the affray, which continued for a short time after he came in, that the defendant then requested the plaintiff to leave the shop quietly, but he refusing to do so the defendant gave him in charge to a policeman, who took him to a station house. Held, first, that the defendant was justified under the circumstances in giving the plaintiff in charge to a policeman, for the purpose of preventing a renewal of the affray. Held, secondly, that the plea was not substantially proved, inasmuch as the alleged assault on the defendant himself, or rather the affray in his presence, was not proved; Timothy

ling-house †with the appurtenants, situate and being in the county aforesaid, (*o*) and being so possessed thereof, the plaintiff, just before and at the said time when, &c., to wit, on the day and year aforesaid, was unlawfully in possession of the said dwelling-house, and with force and arms making a great †noise and disturbance therein, and at the said time when, &c., was therein making such noise and disturbance without the leave or license and against the will of the said J. E., and whereupon the defendant, as the servant of the said J. E. and by his command, then requested (*p*) the plaintiff to cease making his said noise and disturbance, and to go and depart from and out of the said dwelling-house, which the plaintiff then wholly refused to do, whereupon the defendant, as the servant of the said J. E. and by his command, in the defence of the possession of the said dwelling-house, *gently laid his hands* (*q*) on the plaintiff in order to remove, and did then remove him from the said dwelling-house [(*r*) and because he the plaintiff then resisted the defendant in that

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*v.* Simpson, 1 C. M. & R. 757; 5 Tyr. 244; 6 C. & P. 499, S. C.

A plea which professes to justify several assaults and false imprisonments laid in *separate counts*, must show *distinct* occasions upon which the defendant was justified in committing *each* particular trespass. Therefore in M'Curday *v.* Driscoll, 1 C. & M. 618; 3 Tyr. 571, S. C., a plea was held bad on special demurrer, which was pleaded to *several* counts of the above description, and after justifying under process, alleged that the plaintiff forcibly resisted the execution of the process, wherefore the defendants, in order to arrest the plaintiff and to overcome his resistance, committed the trespasses. Bayley, B. observed, "There are six assaults and four imprisonments laid in the declaration.—The party justifying is bound to cover the whole. I see no reason which you give for assaulting him six times. You profess to justify four imprisonments. You should have shown that circumstances existed by which you had a right to imprison him, whereupon you imprisoned him once; and then that such and such circumstances occurred whereby you had a right to imprison him again, wherefore you imprisoned him on the second occasion, and so throughout; but here you do not show any different occasions." On the other hand, it is sufficient to prove so much of a plea as substantially sustains the cause of justification, and covers the trespasses which the plea professes to answer. In Atkinson *v.* Warn, 1 C. M. & R. 827; 5 Tyr. 481; 3 Dowl. P. C. 483, S. C., to a declaration for assault and imprisonment, the plea justified the apprehension of the plaintiff on a charge of felony, alleging his *resistance*, wherefore defendant beat him &c. The evidence supported the justification as to the arrest for felony; but the plaintiff's resistance was not proved. The Court held that the verdict was right, the defendant having proved as much of his plea as was necessary to cover the declaration, and it not being necessary for him to prove what was unnecessarily alleged.

(*n*) Piggott *v.* Kemp, 1 C. & M. 197; 3 Tyr. 128. It was there held on special demurrer, that *de injuriâ* was a good replication to the above plea; see Bardons *v.* Selby, 1 C. & M. 500, *ante*, 723, note. But it would not be a good replication if the plaintiff showed *title* to, and not mere possession of the house, &c.; Vivian *v.* Jenkin, 3 Ad. & E. 741. Where the plaintiff relies on *excessive* violence on defendant's part, as an answer to the justification, he should new assign or reply such excess; *ante*, 731, note (*l*).

(*o*) *Infra* note (*t*).

(*p*) Where the entry is peaceable, there must be a request; Tullay *v.* Reed, 1 C. & P. 6. Plea showing forcible entry, &c.; Weaver *v.* Bush, 8 T. R. 78.

(*q*) This justifies the battery, Titley *v.* Foxall, 2 Ken. 308; see note (*r*).

(*r*) The allegation between the brackets will of course be omitted, if not warranted or rendered necessary by the facts and statement in the declaration. A necessary degree of *beating* and pushing and pulling about may be justified under the *molliter manus imposuit*, but if there were an actual resistance, and in consequence thereof any *wounding*, or a greater degree of violence on the defendant's part than would otherwise have been justifiable, it is proper to state the facts accordingly. A *wounding* (*ante*, 715, note (*b*),) or the striking several blows, and several times knocking down; Gregory *v.* Hill, 8 T. R. 299; Johnson *v.* Northwood, 1 Moore, 420; 7 Taunt. 689, cannot be justified merely to expel a person, without show-

behalf, and then assaulted the defendant, and used violent and menacing language and gestures towards the defendant, and would then and there have beat, bruised and ill-treated the defendant, if he had not defended himself against the plaintiff, he, the defendant, at the said time, when &c., did defend himself against the plaintiff, and in so doing necessarily and unavoidably gave and struck the plaintiff divers blows and strokes, and did wound and ill-treat him, and knock, cast and throw him down to and upon the ground, and necessarily and unavoidably a little rend, tear and damage the clothes and wearing apparel of the plaintiff, (*s*)] doing no unnecessary damage to the plaintiff on the occasion aforesaid, which are the supposed trespasses (*t*) whereof the plaintiff hath above complained against the defendant; and this he is ready to verify, &c.

## 2. *Other Forms of Pleas justifying in defence of Property, &c.*

[Plea to declaration for an assault, &c., justifying as churchwarden, &c., †the expulsion of plaintiff from the parish clerk's reading desk in a church, into which plaintiff had intruded himself; Hartley *v.* Cook, 9 Bing. 728; 3 M. & Sc. 230, S. C.

That defendants were duly assembled in a select vestry, and excluded plaintiff, who intruded: Dobson *v.* Fussy, 7 Bing. 305; 5 M. & P. 112, S. C.; Campbell *v.* Maund.

Plea justifying the expulsion of plaintiff from a *police office;* Collier *v.* Hicks, 2 B. & Ad. 663.

That plaintiff was defendant's servant and refused to quit his house, wherefore defendant assaulted and expelled him; Donaldson *v.* Williams, 1 C. & M. 345.

*Molliter manus imposuit*, to present plaintiff's forcible entry into a house; Weaver *v.* Bush, 8 T. R. 78; 3 Chit. Pl. 5th ed. 1074, 6th ed. 982.

Defence of defendant's close; *id.* 1075, 983.

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ing resistance, &c. The expulsion may be justified, but not an *imprisonment*, unless there be a breach of the peace, &c.; Green *v.* Bartram, 4 C. & P. 308; see *post*, 743, Form 1.

(*s*) Of course this must be varied according to the facts and the averments in the declaration.

(*t*) In Hembro *v.* Bailey, 1 C. & M. 204; 3 Tyr. 152, to a count for trespass and assault, the defendant pleaded a justification in defence of a dwelling-house "situate in the county aforesaid," with an averment "which are the same trespasses," &c., and concluded with a traverse *absque hoc*, "that he was guilty elsewhere than in the dwelling house." It was held that the *quæ est eadem* was sufficient, and that the traverse was surplusage, and bad on special demurrer.

Bayley B., "Try it on principle: the allegation in the declaration is transitory as to time and place, the plaintiff might give in evidence an assault at any time and place, then the defendant justifies an assault in a particular place, and adds that it is the same assault complained of in the declaration. Does he not thereby virtually exclude any other place; and then is not the traverse superfluous, and consequently bad on special demurrer?" Where the house is situate in a different county to that in which the venue is laid, state the fact accordingly and use the *absque hoc*, &c.

Plea in defence of close and teazles there growing, and pleadings thereon; Kingshury *v.* Collins, 4 Bing. 202; 12 Moore, 424, S. C.

Replication thereto, an agreement entitling defendant, &c., to enter and cut the teazles; *id.*]

## FELONY, OR SUSPICION THEREOF (u).

1. ***Plea, that a Burglary had been committed in Defendant's House, that Plaintiff was found in a suspicious manner near the House, wherefore Defendants, one being a Constable, took him before a Magistrate, who remanded him, &c.***

And for a further plea in this behalf, the defendants say, that, just be-

(u) There is a material distinction between arrests without warrant by *private individuals*, and arrests by *peace officers*, on *suspicion* of an offence. In order to justify the former in causing the imprisonment of a person *without a warrant*, he must not only make out a reasonable ground of suspicion, but must prove that a felony has been actually committed by some one; except in the case of hue-and-cry or an indictment found against the party; whereas a *constable* having reasonable ground on a charge preferred by another person to suspect that a felony has been committed, is authorized to arrest the suspected party without warrant and take him before a magistrate or other proper authority, although *no felony* has been committed; Beckwith *v.* Philby, 6 B. & Cres. 637; 9 D. & R. S. C.; Samuel *v.* Payne, Doug. 359; White *v.* Taylor, 4 Esp. Rep. 80; Cald. 291; Hobbs *v.* Branscomb, 3 Camp. 420. If a constable without charge and of his own accord takes a person into custody on suspicion, he must, in general, like a private individual, prove that a crime was actually committed by some one; Hobbs *v.* Branscomb, 3 Camp. 420; (except in certain cases where by statute suspicious persons may be arrested; see *infra.*) The question what is reasonable ground for suspicion, is a mixed proposition of law and fact. Whether the circumstances alleged to show it reasonable or not are true and existed, is a matter of fact; but whether, supposing them true, they amount to a reasonable ground for suspicion, is a question of law; Davis *v.* Russell, 5 Bing. 354; 2 Moore and P. 590, S. C., and cases there cited; Chit. Burn Jus. tit. "Arrest."

A plea of justification by a private individual must state facts showing the ground of suspicion, (that the Court may judge of its reasonableness). In Mure *v.* Kaye, 4 Taunt. 34, the plea justified an imprisonment only by stating that a forgery had been committed, and that afterwards the plaintiff was "suspiciously possessed" of the document, and did "in a suspicious manner" dispose of the same to A. B., and then "in a suspicious manner" left England; wherefore defendant had reasonable cause to suspect, and did suspect plaintiff, &c., and this plea was held bad on (general) demurrer.

There is an important distinction between *felonies* and *misdemeanors* in reference to a constable's *powers of arrest*. In the case of *treason* and *felony* a constable may by virtue of his office and without warrant, arrest a party upon a reasonable charge or suspicion of these offences, although in fact it eventually appear that *none was committed*, and the constable had *no view* of or did not see any part of the transaction; Hale, P. C. 587; 1 East, P. C. 303; Burn, J. tit. Constable, iv. Lewis *v.* Arnold, 4 C. & P. 354. A constable may and is bound at his peril to arrest for felony upon a reasonable suspicion arising from facts within his own knowledge or communicated to him by others; and upon a reasonable charge of felony he is protected and justified in arresting, although before he can take the suspected person before a magistrate, he discovers that no offence has been in fact committed, and therefore discharges him without going before a justice; Ledwich *v.* Catchpole, Cald. 291; White *v.* Taylor, 4 Esp. 80; Stonehouse *v.* Elliot, 6 T. R. 315; Rex *v.* Akenhead, Holt, N. P. R. 473.

But in the case of *affrays*, (see Burn. J. tit. "Constable," iv. "Arrest," iii. 3; Cook *v.* Nethercote, 6 C. & P. 723; and the authorities collected in Timothy *v.* Simpson, 1 C. M. & R. 760; 5 Tyr. 244, S. C.); and the breaches of the peace, &c. it appears that a constable has no power to arrest without warrant, if the affray did

fore the said time when, &c. in the said declaration mentioned, to wit, at —— in †the county aforesaid, certain persons to the defendants unknown, with force and arms, &c. in the night time, to wit, about the hour of one of the clock in the morning of the —— day of —— in the year aforesaid, burglariously and feloniously broke and entered a certain dwelling-house of the defendant W. D., with intent the goods and chattels of the said W. D. therein being feloniously and burglariously to steal, take, and carry away; and that the said persons, just before the said time when, &c., having been disturbed and interrupted in breaking and entering the same, attempted to escape, and made their escape from the said house; whereupon they the defendants did then immediately after the commission of the said felony, and whilst the said offenders were so attempting to escape, raise a hue-and-cry after and go in quest of and search for and endeavor to find and take the said offenders, and they the defendants in making such search did then and immediately after †the said offence was committed, find, perceive, and discover the plaintiff near to the said dwelling-house of the said W. D., and in a certain lane, not being the main high road, close to the said house, the same then and there being an unseasonable hour in that behalf for persons to be abroad, to wit, between the hours of one and two of the clock in the morning of the day and year aforesaid; and the said lane being in the direction which it was probable the said offenders had taken in making their said escape, whereupon the defendants then and there interrogated the plaintiff, and inquired of him who he was and where he was going, and required him to give some account of himself, and to state what he was about, and thereupon

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not take place in his presence, but were quite over when he arrived, and there were no chance of its renewal, and is not justified in arresting in such case even upon a positive charge. For it is a constable's duty to preserve or prevent a breach of the peace, not to punish it, and his arresting after the affray has ended cannot conduce to the former object. In a recent case it was decided that, if there be an affray, a person who witnesses it may, on the spot where it was committed, and while there is danger that it will be continued or renewed, deliver the affrayers in charge to a constable or police officer, and consequently that the latter may, although he did not witness the original affray, legally arrest the party so given in charge in such case; Timothy *v.* Simpson, *ubi supra*. And if an affray has happened, and a wound has been given which there is reasonable ground to suppose may end in felony, a constable may take the party who has given such wound in custody; Cowpey *v.* Henley, 2 Esp. R. 540.

If A. having no right to apprehend B., *direct* a police officer to take B., and he do so, B. may maintain trespass; but if A. merely make a statement to the officer, leaving it to him to act or not, as he thinks proper, trespass does not lie against A.; Hopkins *v.* Crowe, 7 C. & P. 373.

Military and Naval Officers, &c. acting officially, 6 Geo. 4, c. 108, s. 97; Constables, 7 Jac. 1, c. 5; Special Constables, 1 & 2 Will. 4, c. 41; the Metropolitan Police, 10 Geo. 4, c. 44, s. 41; the Thames Police, 3 & 4 Will. 4, c. 19; the Horse Patrol, 6 & 7 Will. 4, c. 50, s. 1; and Police Constables, &c. in Corporate Boroughs, 5 & 6 Will. 4, c. 26, s. 19; and persons acting in their aid; may, in actions against them for any thing done in the execution of their office, plead the general issue and give the special matter in evidence. It is, however, often judicious for these parties to plead specially, in order to compel the plaintiff to new assign, &c. if he rely on excess, &c. or to admit a warrant, if there be one. These persons should take care not to join in a defective special plea with a co-defendant not privileged to plead the general issue; see Hodges *v.* Chapman, 2 Bing. 523; 10 Moore, 143. A private individual giving a party in charge is not in general privileged by these enactments; see Nathan *v.* Cohen, 3 Camp. 257; M'Cloghan *v.* Clayton and another, Holt, N. P. R. 478.

the plaintiff then and there stated to the defendants, that [*&c.*] and the plaintiff did not nor would in any other or more satisfactory manner give an account of himself, and on being then further interrogated by the defendants respecting the said matters, hesitated and prevaricated and contradicted himself in regard to the same, wherefore the defendants having good and probable cause of suspicion, (*z*) and vehemently suspecting by reason of the premises that the plaintiff was guilty of or concerned in the said burglary and felony; and the defendant W. P., then and there being a constable of the township of —— aforesaid, they the defendants did then, to wit, at the said time when, &c. gently lay their hands upon the plaintiff for the cause aforesaid, and did then take the plaintiff into their custody, in order to carry and convey him before a justice or justices of the peace of and for the said county, to answer the premises, and to be there dealt with according to law; [and because it was dark, and the said offenders so unknown to the defendants were not far distant, and the plaintiff expressed his unwillingness to accompany the defendants, and there was reason to suppose, and the defendants then supposed that the plaintiff might and would attempt to escape from their custody, or that the said offenders so unknown to the defendants would attempt to rescue the plaintiff from such custody of the defendants, they the defendants then and there, in order to prevent such escape and rescue, and as was reasonable and necessary for that purpose, put and affixed the said *handcuffs* (*y*) or manacles upon the wrists of the plaintiff, and kept the same upon his wrists until the plaintiff was taken to the said cage or prison as in the said declaration first mentioned;] and because it was then very early in the morning, and an unseasonable time for the defendants to carry the plaintiff before such justice as aforesaid, they the defendants, for that reason and for the cause aforesaid, necessarily and unavoidably conveyed the plaintiff to and imprisoned the plaintiff, and kept and detained him in the said prison there called the cage in the said declaration first-mentioned, until a convenient and fit time of the day of the said —— day of —— in the year aforesaid; and the defendants further say, that as soon as conveniently could be on the day and year last aforesaid, the said W. P. as and so being such constable as aforesaid, did at the instance of the said W. D. carry and convey the plaintiff in his custody to the said police office in the said declaration mentioned, before a certain person, to wit, M. W. Esq. then being one of her majesty's justices assigned to keep the peace of and for the county aforesaid, and also to hear and determine divers felonies and misdemeanors therein committed, to answer the premises and to be there dealt with according to law; and the defendants further say, that the said justice did thereupon then and there order the plaintiff to be remanded until the then next following day for examination, and that the said W. P. should then bring up the plaintiff for examination touching the premises, whereupon the said W. P. as and so being such constable aforesaid at the instance of the said other defen-

(*z*) *Ante*, 735, note (*u*).

(*y*) See Wright *v.* Court, 4 B. & C 596.

dant did thereupon necessarily and unavoidably again imprison the plaintiff, and keep and detain him in prison until the then following day, to wit, the —— day of —— in the year aforesaid, when the plaintiff was again carried and conveyed by the defendant W. P., as and so being such constable, and by the said other defendant in his aid and assistance, and at his instance, before the said justice for further examination, according to the said order of him the said justice, and again examined by the said justice touching and concerning the said premises; and thereupon the said justice then and there made his certain warrant in writing under his hand and seal, directed to the keeper of the New Prison, Clerkenwell, or his deputy, and thereby required such keeper or his deputy to receive into his custody the body of the plaintiff therewith sent him, brought before the said justice, and charged before him upon the oath of the said W. D. on suspicion of having been concerned with others in burglariously breaking the dwelling-house of the said W. D. against the peace, &c.; and by the said warrant the said justice then commanded the said keeper, or his deputy, safely to keep the plaintiff in his said custody for re-examination on Monday then next, which said warrant the said justice then delivered to the said W. P. as and so being such constable, whereupon the plaintiff was then under and by virtue of the said warrant at the instance of the defendant W. P., and he the said W. P., then and there being and acting as such constable as aforesaid, carried and conveyed as in the said declaration mentioned, to the said Clerkenwell prison, and there necessarily and unavoidably imprisoned and kept and detained in prison according to the said warrant, until the Monday then next, to wit, the —— day of —— in the year aforesaid, when he the plaintiff was by the said W. P. as and so being such constable as aforesaid, and at the instance of the said other defendant, carried and conveyed before the said justice for re-examination according to the said warrant, and the plaintiff was then again examined by and before the said justice touching and concerning the said premises, and the plaintiff was then after a further investigation of the said matters discharged out of custody by the said justice, and by means of the several premises, the plaintiff was imprisoned and kept and detained in prison for the said several spaces of time, and in the said manner in the said declaration mentioned, the same being just, reasonable and proper for that purpose and lawful for the cause aforesaid, which are the said several supposed trespasses, whereof the plaintiff hath above thereof complained; and this the defendants are ready to verify.

2. *Plea justifying Imprisonment and taking Goods, that some Indigo had been stolen from Defendant, that on searching Plaintiff some Indigo was found on him, wherefore Defendant had Plaintiff taken before a Magistrate, &c.*

And for a further plea in this behalf, the defendant saith, that before

the said time when, &c. to wit, on [*&c.*], in the county aforesaid, a large quantity, to wit, 11 oz. of indigo, the property of the defendant, was feloniously stolen, taken and carried away from the defendant by a person then unknown to the defendant, and that shortly afterwards and before the said time when, &c., to wit, on [*&c.*] defendant had *reasonable and probable cause* to suspect and did suspect that the plaintiff did feloniously steal the said indigo in this, to wit, that the plaintiff was then found lurking about in a suspicious manner near the house from which the said indigo was so stolen shortly after it was stolen, and also in this, to wit, that upon the plaintiff being then and there searched a quantity, to wit, 11 oz. of indigo, resembling the defendant's said indigo, was then and there *found upon and in the possession of plaintiff*, which said last mentioned indigo defendant had then and there reasonable and probable cause to suspect and believe, and did then suspect and believe, to be the indigo of defendant, and which was stolen from him as aforesaid; whereupon for that cause afterwards, to wit, on [*&c.*] one E. B. being then and there one of the police constables of the borough of G—— in which the said felony was committed, at the request of the defendant, gently laid his hands on the plaintiff and took and arrested him on suspicion that he did feloniously steal the said indigo, the property of the defendant, and in order to carry him before a magistrate to answer that matter and to be examined touching the same, and the defendant did then and there take into his hands and possession the said indigo so found upon and in the possession of the plaintiff as aforesaid, in order and with intent to produce and show the same to and before such magistrate upon the hearing of the said charge; and the said E. B. did then and there accordingly, at the request of the defendant, carry and convey the plaintiff to and before the said A. B. Esq. at —— aforesaid, he, the said A. B., being then and there one of the justices of our lady the queen, assigned to keep the peace of our lady the queen in and for the borough aforesaid, and to hear and determine divers felonies, trespasses and other misdemeanors committed in the same, and the defendant †did then and there produce and show the said last mentioned indigo before the said E. B. and delivered the same to him, and the said E. B. then and there took the same into his possession and custody for the purposes of the examination of the plaintiff touching the matters aforesaid, and the plaintiff was thereupon then and there, to wit, on [*&c.*] examined by and before the said A. B. touching and concerning the said felony, and the said last mentioned indigo was at the same time and place produced and shown to the plaintiff and also to the defendant; and the defendant then before the said A. B. charged the plaintiff with being suspected to be guilty of the said felony, and was then examined by the said A. B touching the same and his reason for suspecting the plaintiff, and upon such examination so had and made, the said A. B. thereupon, to wit, on [*&c.*] dismissed the plaintiff out

of custody upon the said charge; and the said indigo being the said goods and chattels in the said declaration mentioned, so taken and detained as aforesaid, was by order of the said A. B. then delivered and returned to the plaintiff, which are the supposed trespasses in the said declaration mentioned; and this the defendant is ready to verify, &c.

3. *To a declaration for an Assault, &c. and taking Plaintiff to a Police Station and before a Magistrate;—Plea under the Metropolis Police Act, that Plaintiff was found in Defendant's House under suspicious circumstances.* (*z*)

And for a further plea in this behalf the defendant says, that before and at the said time when, &c. he was lawfully possessed of the said dwelling-house in the said declaration mentioned, the same being situate within the metropolis and within the district and limits mentioned in a certain act of parliament made and passed in the 10th year of the reign of his late Majesty King George the Fourth, intituled "An Act for improving the Police in and near the metropolis," and the defendant being so possessed thereof he, the defendant, was about at a late hour of the night of the day in the said declaration mentioned, and just before the said time when, &c. to lock up and secure the outer door of his said dwelling-house for the night, but the key of such door could not upon or after due and diligent search and inquiry be found, and there was reason to believe and suppose that the said key had been improperly taken by some person or persons from the said outer door for some improper purpose, and in order to open the said door in the prosecution of a felonious or improper design or object, and there was reason to suspect, and the defendant just before and at the said time when, &c. did thereupon reasonably suspect that some person or persons had improperly and with felonious or evil design obtained admittance to and then was concealed in the said house, whereupon the defendant then and just before the said time when, &c. sent for the said policeman or officer in the said declaration mentioned, and who belonged to the police force established under the said act, and was a policeman for the district wherein the said house was situate, and who was then on duty [to wit, one ——] and stated to him the said circumstances and requested him to search, and the said policeman then thought it was necessary and proper to search the said

(*z*) By the 10 Geo. 4, c. 44, s. 7, (the Metropolis Police Act) policemen on duty may apprehend "all loose, idle and disorderly persons whom they shall find disturbing the peace, or whom they shall have just cause to suspect of any evil design, and all persons whom they shall find between sunset and the hour of eight in the forenoon lying in any highway, yard or other place, or loitering therein and not giving a satisfactory account of themselves," &c. See also the powers of 3 & 4 W. 4, c. 19, s. 31, in case of suspected persons and reputed thieves in parks, highways, &c. As to the powers of police constables in corporate boroughs, see 5 & 6 W. 4, c. 76, s. 78, Burn's J. tit. "Police." As to pleading the general issue see *ante*, 736, n. (*u*).

dwelling-house for the purpose aforesaid, and thereupon the said policeman, having just cause to suspect and then suspecting that some person was in the said house improperly and with such evil design, then entered and searched and examined the whole of the said dwelling-house, and upon such search and inquiry the plaintiff was found in a private part of the said house, he not having any lawful or just or reasonable ground, excuse or cause for being in the said house, and it then being a late hour of the night and an unreasonable hour for his being in the said house; whereupon the defendant and the said police-officer requested the plaintiff to give a satisfactory account of himself, but he neglected and refused so to do, and by reason of the premises the defendant and the said police officer had cause and reason to suspect and did before and at the said time when, &c. suspect that the plaintiff had improperly taken the said key and had unlawfully entered and was in the said house with an evil design; whereupon the said police-officer, and the defendant in the aid and assistance of the said police-officer, then and there gently laid their hands upon the plaintiff in order to take and did then and there take him into the custody of the said police-officer, and did take and deliver him into the custody of a certain constable appointed under the said act, who was in attendance at the nearest station-house, being the said police station-house in the said declaration mentioned, and the plaintiff was there kept and detained in custody for the cause aforesaid, until he afterwards and as soon as conveniently could be, was carried before the said justice of the peace in the said declaration mentioned, to wit, —— Esq. being a police magistrate acting and having authority under the said statute, for examination concerning the premises, and to be dealt with according to law, and on that occasion the said acts in the said declaration mentioned, and therein supposed to be trespasses, were necessarily and lawfully committed by the defendant, and the plaintiff was necessarily and unavoidably imprisoned and kept and detained in prison for the said space of time in the said declaration mentioned, which are the same supposed trespasses whereof the plaintiff hath above thereof complained against the defendant; and this he is ready to verify.

### †4. *Other Pleas justifying Imprisonment for Felony, or Suspicion, &c.*

[Plea justifying arrest, handcuffing and detention on suspicion of felony; form held bad, it justifying detention to enable prosecutor to adduce evidence and not showing sufficient ground for handcuffing; Wright *v.* Court, 4 B. & C. 596; 6 D. & R. 623, S. C.

Plea justifying arrest on suspicion plaintiff had stolen a horse, &c.; Hedges *v.* Chapman, 2 Bing. 523; 10 Moor. 143.

Other forms; Hall *v.* Booth, 3 N. & M. 316; 3 Chit. Pl. 5th ed. 1081, 6th ed. 987, 989.

Plea showing felony committed; *id.* 5th ed. 1080, 6th ed. 990.

Plea justifying imprisonment by a military officer abroad, the plaintiff acting mutinously; Replication, &c.; Bradley *v.* Arthur, 4 B. & C. 292; 6 D. & R. 413, S. C.]

### MASTER AND SERVANT; APPRENTICE, &c.

[Plea justifying moderate correction of an *apprentice* for disobedience; 3 Chit. Pl. 5th ed. 1072, 6th ed. 679; Penn *v.* Ward, 2 C. M. & R. 338; 1 Gale, 109; 4 Dowl. P. C. 215; the like of a *mariner* acting mutinously; 3 Chit. Pl. 5th ed. 1072, 6th ed. 979; Gale *v.* Dalrymple, Ry. & M. 118; Murray *v.* Montriou, 6 C. & P. 471; Lamb *v.* Burnett, 1 Tyr. 265; 1 C. & J. 291; Johnson *v.* Bridge, 3 Dowl. 207. If the *cause* for *any* correction, &c. be denied, *de injuria* may be replied; see Form *ante*, 728; but if the plaintiff contend that there was an *excess* of correction, &c., he *must new assign;* see Penn *v.* Ward, *supra;* or rather *reply* excess; *ante*, 731, Form 3.]

### NEW ASSIGNMENT IN TRESPASS TO PERSONS.

[When the plaintiff should reply *de injuria* or new assign, &c. in trespass to persons; *ante*, 728, note (*e*); *ante*, 731, note (*l*). Where the plaintiff relies on an *excess* only, he should *reply* it; see Form 3, *ante*, 371, and note (*l*). Where he relies on another *distinct* trespass than that justified, and there is no second count adapted to such further trespass, there should be a new assignment as in Form *ante*, 730. As to new assigning, &c. to plea justifying under *process*, see *ante*, 729, note. As to new assignments in general, pleadings, and costs thereon, see *infra* "Trespass to *realty*," tit. "New Assignment."]

### †NUISANCE.

*Justification by a Marshal of the City of London, that a certain Passage was ordered by the Lord Mayor to be kept clear of foot Passengers; that Plaintiff obstructed the passage, wherefore Defendant, on his refusal, with no more Force than necessary, removed him.* (*z*)

(*z*) Mason *v.* Cope, 5 C. & P. 193.

PEACE—BREACH OF.

1. *Plea that Plaintiff came to the Defendant's House in the Night and refused to leave, wherefore Defendant attempted to turn him out, and on his Resistance, &c. caused him to be taken to a Police Station, and the next morning before a Magistrate.* (a)

And for a further plea in this behalf, the defendants say that before and at the said time when, &c., in the said declaration mentioned, the defendant H. T. was lawfully possessed of a certain dwelling-house and printing-office situate in the parish of —— in the county aforesaid, and wherein he then carried on the business and employment of printing, publishing and selling a certain newspaper called the ——, and the said H. T. being so possessed thereof, the plaintiff, together with a certain other person, to wit, one J. W. P. just before the said time, when, &c., to wit, on the day and year aforesaid, without the leave or license of the said H. T., and at an unseasonable hour, to wit, at twelve o'clock at night, entered and came into the said dwelling-house, and then with force and arms made a great noise and disturbance therein, and then insulted, abused and ill-treated the said H. T. and his servants and workmen in his said dwelling-house, and greatly disturbed and disquieted them in the quiet possession of the said dwelling-house and in and about the carrying on therein the said business and employment, *in breach of the peace (a)* of our said lady the queen; whereupon the said H. T. then and there requested the plaintiff and the said J. W. P. to cease their said noise and disturbance and to depart from and out of the said dwelling-house, which they the plaintiff and the said J. W. P. then and there wholly refsued to do, and they then contiued in the said dwelling-house making the said noise and disturbance therein, and then threatened the said H. T. that they would continue making the said noise and disturbance (b) in the said dwelling-house, whereupon the said H. T. in his own right, and the said †A. C. L. as the servant of the said H. T. and by his command, in order to preserve good order and tranquillity in the said house at the said time when, &c., gently laid their hands on the plaintiff and on the said J. W. P. in the said dwelling-house for the purpose of removing them therefrom, and did then force and compel the plaintiff to go down the said stairs, and drag him through and along the said passages into the said public street, and thereupon the plaintiff and the said J. W. P. at the said time when, &c., there

(a) See forms and law Timothy *v.* Simpson, 5 Tyr. 244; 1 C. M. & W. 757. S. C.; Ingle *v.* Bell, 1 M. & W. 516; Cohen *v.* Huskisson, 2 *id.* 477; Oakes *v.* Wood, *id.* 791; Howell *v.* Jackson, 6 C. & P. 733; 2 Chit. Pl. 5th ed. 1076, 6th ed. 983 and notes. As to arrest for breach of the peace, by constables, &c., see *ante*, 735, 736, n. (u). The plaintiff may reply *de injuriâ*; see cases *supra*, and *ante*, 728, note (e). See in general as to the mode of framing pleas of this description, and proof thereon, &c., *ante*, 732, note (m). As to constables, &c. pleading not guilty, see *ante*, 736, note.

(b) See Howell *v.* Jackson, 6 C. & P. 723.

violently and with a strong hand resisted the said endeavors of the defendants to turn them out of the said house, and still continued to make such noise, disturbance and affray in the said house, and threatened and forcibly and with a strong hand endeavored to remain therein making such noise and disturbance, and then *assaulted* (*c*) the defendants, and beat and ill-treated them; whereupon the defendants did then defend themselves against the plaintiff and the said J. W. P., and in so doing did pull and drag about the plaintiff, and give and strike him the said blows and strokes, and cast, push and throw the plaintiff down the said stairs, and tread, trample and jump upon him, and rend, tear, damage and destroy the said clothes and wearing apparel of the plaintiff; and thereupon the plaintiff and the said J. W. P. at and near the outer door of the said dwelling-house, continued making their said noise and disturbance and breach of the peace, and then threatened the defendants that they would continue making their said noise and disturbance; whereupon the said H. T. in his own right and the said other defendant as his servant and by his command, in order to (*d*) preserve the peace and restore good order and tranquillity in and about the said house, and prevent the continuance and renewal of the said breach of the peace, then gave charge of the plaintiff to A. D. then and there being a police constable and peace officer of and for the district and place in which the said house was and is situate, and who then saw and had view (*e*) of the said breach of the peace so committed by the plaintiff as aforesaid, and then requested the said A. D. to take the plaintiff into his custody, and carry him before some justice or justices of our said lady the queen assigned to keep the peace in and for the said county of ——, to answer the premises and to be dealt with according to law; and the said A. D. so being such *constable* as aforesaid, at such request of the defendants, then gently laid their hands on the plaintiff, and did then take the plaintiff into his said custody in order to carry and convey him before such justice as aforesaid, to be dealt with according to law for his said offence and breach of the peace; and because it was then late at night and an unseasonable time for the plaintiff to be carried before such justice or justices of the peace for the purpose aforesaid, the said A. D. so being such police constable and peace officer as aforesaid, for that reason and for the cause aforesaid, necessarily forced and compelled the plaintiff to go in and along the said public streets and places in the declaration mentioned to the said police station, and then and there imprisoned the plaintiff, and kept and detained him in prison there until the next morning and for the said space of time in the said declaration mentioned; and the defendants further say,

(*c*) As to the proof of this, see Timothy *v.* Simpson, 1 C. M. & R 757; 5 Tyr. 244, S. C., *ante*, 733, note (*m*); see further Howell *v.* Jackson, 6 C. & P 733. Forms showing that plaintiff caused a *riot*; Ingle *v.* Bell, *supra*; Cohen *v.* Huskisson, *supra*. Effect of inability to prove the *riot*; *id.*

(*d*) *De injuriâ* does not traverse the *motive*; Oakes *v.* Wood, 2 M. & W. 791; see *ante*, 729, note.

(*e*) When this allegation is not necessary, see Timothy *v.* Simpson, *ubi supra*.

that on the next morning, as soon as conveniently could be, the defendants forced and compelled the plaintiff to go in the custody of the said police constable and peace officer before T. H. Esq., one of her majesty's justices assigned to keep the peace in and for the said county of ——, at the said police office, for examination concerning the premises and to be dealt with according to law, and on that occasion the plaintiff was necessarily and unavoidably again imprisoned, and kept and detained in prison for the said space of time in the said declaration mentioned, doing as little injury and damage on the occasion aforesaid to the plaintiff, and his clothes and wearing apparel, as the defendants possibly could, which are the supposed trespasses in the said declaration mentioned, and whereof the plaintiff hath above complained against the defendants; and this they are ready to verify, &c.

2. *Other Forms of Justification of Assault, &c. to preserve the Peace.*

[Plea of justification of an assault and battery, to prevent defendant and another person from fighting, &c.; 3 Chit. Pl. 5th ed. 1071; 6th ed. 978.

In defence of third person; *id.*; Bone *v.* Daw, 3 Ad. & E. 712.

Pleas justifying assault in defence of house, police-office, &c.; *ante*, 732, Forms 1 and 2.

Plea justifying the removal of a plaintiff from a church, he making a disturbance; Williams *v.* Glenister, 2 B. & C. 699; 4 D. & R. 217, S. C.

Plea justifying arrest to compel plaintiff to quit defendant's house; Timothy *v.* Simpson, *ante*, 733, note (*m*); *ante*, 743, Form 1.

The like because plaintiff attempted forcibly to enter and caused a riot near plaintiff's house; Ingle *v.* Bell, 1 M. & W. 516; Cohen *v.* Huskisson, 2 M. & W. 477.]

1st. JUSTIFICATION UNDER CIVIL PROCESS.

1. *Plea (in Trespass for Imprisonment, &c. against a Sheriff and Officers) justifying under a writ of capias against a third person, whom Plaintiff fraudulently personated.*

And for a further plea in this behalf, the defendants say, that before either of the said times when, &c. to wit, on the —— day of —— A. D. —— a †certain writ of our lady the queen, called a writ of capias, was issued out of the Court of Queen's Bench at Westminster directed to the sheriff of Surrey, by which said writ our said lady the queen commanded the said sheriff that, &c. [*set out the writ and the indorsement for*

*bail and the delivery of writ to the sheriff* " before the said times when, &c., or either of them,"]; and thereupon the said H. C. so being sheriff as aforesaid, afterwards and before the return of the said writ and before either the said times when, &c. in the said first count mentioned, to wit, on the day and year last aforesaid, in the county of Surrey aforesaid, made his certain warrant in writing under his hand and seal of office of sheriff aforesaid, directed to the said defendants R. and G. the said sheriff's bailiffs, and thereby commanded them, the defendants R. and G., that they should take the said T. C., otherwise T. W., if she should be found in the said sheriff's bailiwick, and safely keep her [*&c. setting out warrant*] which said warrant afterwards and before the return of the said writ and before either of the said times when, &c. to wit, on the day and year last aforesaid, was delivered to the defendants R. and G. to be executed in due form of law; and the said several defendants further say, that before and at the said times when, &c. and before the return of the said writ, the said R. and G., being such bailiffs and having such warrant, were in search of the said T. C. in order to arrest and were endeavoring to take and arrest, and were about to arrest her upon and by virtue of the said writ and warrant, but the person of the said T. C. was unknown to the said R. and G. and each of them, all which premises the plaintiff then and there well knew, and that before and at the said times when, &c. the plaintiff, for the purpose of preventing the said R. and G. from arresting the said T. C. upon and by virtue of the said writ and warrant, and of defeating the execution thereof, then and there, to wit, before and at the said times when, &c. in the said county of Surrey, wrongfully, wilfully, knowingly, falsely, fraudulently and deceitfully did personate the said T. C. to the said R. and G. and assume to them the usual appearance and description of the said T. C. as the same had been represented to the said R. and G. for the purpose of executing the said writ and warrant as the plaintiff well knew, and then and there wrongfully, wilfully, knowingly, falsely, fraudulently and deceitfully, and for the purpose aforesaid, caused and induced and procured the said R. and G. to believe and suppose, and they accordingly by such procurement did then and there believe and suppose that the plaintiff really was the said person T. C. mentioned in the said writ and against whom the same was issued, and under such supposition and belief, and by reason of the said fraud and deceit of the plaintiff, did then and there, as such bailiffs holding the said warrant, at the said time when, &c. take and arrest the plaintiff by her body and take her to a proper place of confinement in the said county of Surrey and detain her in their custody under such supposition and belief and under color of the said writ and warrant until the plaintiff discovered and declared to the said R. and G. that she was not the said T. C., whereupon the said R. and G. immediately discharged the plaintiff out of their custody and suffered and permitted her to go at large, and the said several supposed trespasses in the declaration mentioned were necessarily committed on that occasion, and not

otherwise; and the plaintiff well knowing that the said R. and G. acted under the said supposition and belief did not at any time during the said several times in the said declaration mentioned, in any manner disclose to either of the defendants that she was not the said T. C.; and this the defendants are ready to verify, &c.(*d*)

## 2. *Other Forms justifying under Civil Process.*

[Justification under a capias against the plaintiff; 3 Chit. Pl. 5th ed. 1083, 1087, 6th ed. 991—994; Reddell *v.* Pakeman, 3 Dowl. 714; 1 Gale, 104; 2 C. M. & R. 30, S. C.

A sheriff (*or his officer*) justifying under *mesne* (*not final*) process against plaintiff must show its return: Com. Dig. Pleader, 3 M. 24; Cheasley *v.* Barnes and others, 10 East, 82; Shortland *v.* Govett, 5 B. & C. 488; Tidd, 9th ed. 1033, note a.

Justification under proceedings to outlawry; Reddell *v.* Pakeman, *supra.*

Form of plea justifying under writ of *detainer*; and Replication, no affidavit of debt and other pleadings, &c.; Young *v.* Beck, 1 C. M. & R. 448; 3 Dowl. P. C. 280.

Plea, *molliter manus imposuit, to serve* plaintiff with a writ; Replication, &c.; Harrison *v.* Hodgson, 10 B. & C. 445.

Form of plea of justification under a *ca. sa.* against plaintiff; 3 Chit. Pl. 5th ed. 1088, 1089, 6th ed. 997, 998.

The like and replication *de injuriâ* to the residue, &c.; Kerby *v.* Denby, 1 M. & W. 336; Whalley *v.* Williamson, 7 C. & P. 294; *infra*, Form 3.

Justification under *ca. sa.* out of the Palace Court; 3 Chit. Pl. 1091, 1000.

By an attorney; Oakley *v.* Davis, 16 East, 82.

Justification under an *attachment* out of Q. B.; Phillips *v.* Howgate, 5 B. & Al. Al. 220.]

## 3. *Replication De Injuriâ, &c. to Plea of Justification under Process.* (*e*).

And as to the said [second] plea, the plaintiff saith, that though true it is that the said writ was issued and delivered to the said sheriff [and that the said warrant was granted and delivered to the said ——] as in the

(*d*) The plaintiff, admitting the writ and warrant, replied *de injuriâ* as to the *residue*. The defendants obtained a verdict. See Selw. N. P. tit. "Imprisonment" I.; Price *v.* Harwood, 3 Camp. 108; Morgan *v.* Bridges, 1 B. & Ald. 647. There was also a plea of license in the above case.

(*e*) When the plaintiff should reply or new assign excess, &c. see *ante*, 228, 729, note (*e*); 730, 731, Form 3. *Motive* whether put in issue by *de injuria*; Oakes *v.* Wood, 2 M. & W. 798.

said [second] †plea alleged, *(f)* yet for replication to that plea the plaintiff saith, that the defendant at the said time when, &c. of his own wrong and without the *residue* of the cause in the said —— plea alleged, committed the said trespasses in the declaration mentioned as the plaintiff hath above complained against him; and this the plaintiff prays may be inquired of by the country, &c.

### 2nd. UNDER CRIMINAL PROCESS.

[Plea, justification of an assault and imprisonment under a magistrate's warrant for an assault; 3 Chit. Pl. 5th ed. 1091 a, 6th ed. 1001.

Justification under a judge's warrant on an indictment for perjury; Gladwell *v.* Blake, 5 Tyr. 186; 1 C. M. & R. 636.

The plea there was held bad after verdict for not showing that the constable acted within his jurisdiction.

The plaintiff may admit or protest the warrant, &c. and reply *de injuriâ* as to the residue; see *id.* Form 3, *ante*, 747.

New assignment of excess; *ante*, 729, note; 731, Form 3.]

### SON ASSAULT DEMESNE.

[See Form 1, *ante*, 731.]

### WILFUL TRESPASS.

[Plea to a declaration for assault and imprisonment, that the plaintiff *wilfully* trespassed in and injured defendant's close, wherefore defendant, under 1 Geo. 4, c. 56, took him before a magistrate; and *replication* that the trespass was not wilful, &c.; Looker *v.* Halcomb, 4 Bing. 183.]

## II. PERSONALTY.

### 1. *Not Guilty.*

[See Form, &c. *ante*, 725. We have seen that in trespass *de bonis*

(*f*) Or the writ or warrant may be denied instead of this form, but the *whole* of the plea cannot be traversed by *de injuriâ* generally; *ante*, 728, note (*e*).

*asportatis*, not guilty only denies that defendant committed the trespass alleged, by taking or damaging the goods mentioned; but does not deny the plaintiff's *property* therein; see Forms, *infra*, and note (*g*). Matter of *justification* or *excuse* must be specially pleaded in this action, as well as a release, or other matter in *discharge* of it.]

### 2. *Denial that the Goods are the Plaintiff's.* (*g*)

And for a further plea in this behalf, the defendant saith, that at the said time when, &c. the said goods and chattels in the declaration mentioned were not nor was either of them or any part thereof the goods and chattels of the plaintiff, in manner and form as the plaintiff hath above alleged; and of this the defendant puts himself upon the country, &c.

### 3. *Assignees of a Bankrupt.*

[See Forms in *Trover* by and against assignees of a bankrupt, which can readily be applied to forms in trespass, *ante*, 678 to 688; see Special Form in Trespass (giving color), Jones *v.* Brown, 1 Bing. N. C. 484; 1

(*g*) It is essential to traverse the title or possessory right specially. It cannot be inquired into under not guilty. As to the nature of property in or title to goods, in general, see *ante*, 663, note (*a*); and as to the nature and effect of pleas in *trover* denying plaintiff's title, or setting up specially a title in defendant or under a person under whom he claims, *giving the plaintiff color*, see *ante*, 672, Forms, 1, 2; and *id.* notes (*k*), (*i*). It will be observed, that in *trover* the declaration charges "that the plaintiff was lawfully possessed as of his own property;" *ante*, 663, 664; and the plea traverses that specific allegation. In *trespass* the plaintiff claims title only by averring that the defendant took the goods "of the plaintiff." Under this the plaintiff may prove a *title*, general or special, (if not *in reversion*,) with a possessory right, and actual or constructive possession; or he may rely on and prove *mere actual possession*, which suffices against a wrong doer, or person not proving either a title in himself *or* in another person, *and* the authority of that person to commit the trespass; see *id.*; *ante*, 713, note (*a*); 1 Chit. Pl. 6th ed. 169, 170. In trespass for taking goods, the plea that the goods were "not the goods of the plaintiff," puts no more in issue than the plea of not guilty did formerly; and if the plaintiff show that he was in the peaceable possession of the goods when taken, the defendant will not be allowed to set up that the goods were the property of a third person, who is not shown to have authorized the trespass; Ashmore *v.* Hardey, 7 C. C. & P. 501; Nelson *v.* Cherrill, 1 M. & Sc. 452; 8 Bing. 316, S. C. In general the above plea will suffice to try the title or possessory right: but it is often advisable to plead *specially, claiming title in defendant*, but in this case express or implied *color* must be given the plaintiff; see the Forms in Trover, (especially Form 2,) *ante*, 673, (*et sub.*); *id.* note (*i*). These forms may readily be adapted to pleas in Trespass. In Jones *v.* Brown, 1 Bing. N. C. 484; 1 Hoag. 33, S. C., which was trespass against assignees of a bankrupt for taking goods, they pleaded that the goods were not the goods of plaintiff; and 2dly, a plea setting out the bankruptcy, fiat, &c. and claiming title as assignees, giving color; see *ante*, 679. note (*q*). Plea in Trespass for entering a house and taking goods, that the goods were defendant's property, and had been feloniously stolen from him by a third person, and taken to plaintiff's house, wherefore, &c.; Wilton *v.* Edwards, 6 C. & P. 677: (*sed qu*, whether that form is sufficient, it appearing not to give the plaintiff sufficient color of title to the goods.) Where some of the goods were the plaintiff's, the plea should be applied to the rest only, and the value of the plaintiff's goods and a sum for damages should be paid into Court upon a plea of payment of money into Court.

Hodges, 33. The statement of bankruptcy and proceedings under a *fiat* will be found, *ante*, 250 to 252.]

4. *To a Declaration in Trespass for carelessly Driving, &c. against Plaintiff's Carriage:—Plea, that his carelessness caused the Injury.*

[See Form, &c. in *Case*, *ante*, 621, and Gough *v.* Bryan, 5 Dowl. 765; †2 M. & W. 770, S.; cited *ante*, 730, note (*h*); but the decision there would not seem to apply in *trespass*. Forms of Pleas, 3 Chit. Pl. 5th ed. 1097, 6th ed. 1013. Plea, that defendant's horse took fright and ran against plaintiff; Wakeman *v.* Robinson, 1 Bingh. 213. In Knap *v.* Salisbury, 2 Camp. 500, (before the New Rules), it was held by Lord Ellenborough to be necessary to plead specially in *trespass*, that the collision took place through plaintiff's negligence, or by mere accident, and without defendant's default. The plea of not guilty in trespass for driving against plaintiff's horse and gig, only puts in issue the fact, whether defendant did so drive, and not the plaintiff's negligence; but if *plaintiff* drove against defendant, that may be shown; Pearcy *v.* Walter, 6 C. & P. 232.]

## CATTLE, GOODS, &c.—DAMAGE FEASANT, &c.

1. *Plea for seizing and taking Cattle, &c. justifying for a Distress Damage Feasant.* (*h*)

And for a further plea in this behalf, (*i*) the defendant saith, that before and at the said time when, &c. he the defendant was lawfully possessed (*k*) of a certain close [called ——, (*l*)] situate in the parish of ——, in the county aforesaid, (*m*) and because the said cattle at the said time when, &c., were wrongfully in the said close eating the grass there, and doing damage to the defendant, he the defendant at the said time when, &c. seized and took the said cattle in the said close as a distress for the said damage, and led and drove the same out of the said close to a cer-

(*h*) See Forms in 3 Chit. Pl. 5th ed. 1092, 6th ed. 1007; Dye *v.* Leatherdale, 3 Wils. 20; 1 Saund. 221, n. 1; and in the cases cited *infra* in the notes.

(*i*) Sometimes it may be necessary to except some of the trespasses not justifiable. As to justifying or omitting to plead to an alleged conversion, see Taylor *v.* Cole, 1 H. Bla. 555, in error; S. C. in K. B. 3 T. R. 292.

(*k*) As to showing *title*, see *post*, 751, n. (*p*).

(*l*) It seems not necessary to name or particularly describe the close; see Bond *v.* Downton, 2 Ad. & E. 26. In that case the close was named, and plaintiff replied that defendant was not possessed "of the close in the plea mentioned, wherein the said pigs were alleged to be eating;" and it was held that plaintiff was not only bound to prove his possession of a close of the name stated, but that such was the close in which the cattle were eating, &c. In general *de injuriâ* is a good replication; when not, see *post*, 751, n. (*p*).

(*m*) If in another county, see *ante*, 738, n. (*t*).

tain common pound in the said parish, and there impounded the said cattle, and kept them impounded for the time in the declaration mentioned (*n*) being the trespasses in the declaration mentioned; and this the defendant is ready to verify.

### 2. *Replication thereto.*

[*De injuriâ* may be replied, see Form 9, *ante*, 728; unless the defendant claims *title* to and not mere possession of the close, &c., see *id.* note (*e*). Where the plaintiff relies on *excess*, he should reply it specially, see *ante*, 728, note (*e*); 731, Form 3. If the defendant, after the distress, converted the goods to his own use, that fact should be replied, see Dye *v.* Leatherdale, 3 Wils. 20; 3 Chit. Pl. 5th ed. 1207, 6th ed. 1123. Replication, right of common, *id.*; Defect of fences, *id.*

### 3. *Plea, justifying the Removal of Goods encumbering Defendant's Premises.* (*o*)

And for a further plea, as to the seizing, taking, and carrying away the said goods and chattels in the said declaration mentioned, the defendant saith, that the plaintiff ought not to maintain his aforesaid action thereof against him, because he saith, that at the said time when, &c., he was lawfully *possessed (p)* of a certain *close*, situate in the parish of

(*n*) As to showing a sale to pay expenses, &c., see 5 & 6 Will. 4, c. 59, s. 4.

(*o*) See Forms, 3 Chit. Pl. 5th ed. 1094, 6th ed. 1008; Neville *v.* Cooper, 2 C. & M. 329; Drewell *v.* Fowler, 3 B. & Ad. 735; and in the cases cited *infra* in the notes. See Form in Trespass for stopping, &c. waggon and horses, and replication, that plaintiff went upon the close to remove corn as outgoing tenant, under a custom of the country; Holding *v.* Piggott, 7 Bing. 465; 5 M. & P. 427.

(*p*) Or the defendant may show *title* in fee in himself, or in another person, alleging a demise from him, as in Vivian *v.* Jenkin, 3 Ad. & E. 741; 3 N. & M. 14; 1 H. & W. 468; and this is sometimes advisable, as *de injuria* generally cannot in such case be replied, as it may be where the plaintiff relies only on *possession* as above; see *id.* In that case the first count was for breaking plaintiff's close, and damaging certain chattels on divers days, &c. The second was for damaging certain chattels, and destroying others on one day. The first plea to both counts gave color to plaintiff, and made title in defendant under a demise from the owner of the fee as to the close mentioned in the first count, and justified his entry, and the trespass to the chattels as encumbering the close, not avering identity of the chattels in the two counts. The second plea to the second count alleged possession by defendant of a close, and justified the trespass to the chattels as encumbering it. The replication to the first plea so far as it related to the first count traversed the demise, and so far as the plea related to certain of the chattels mentioned in the second count, replied *de injuria*; and so far as it related to other of them, replied *excess*. The replication to the second plea, so far as it related to certain of the chattels mentioned in the second count, replied *de injuria*; and so far as it related to certain other of them, replied *excess*. There were separate formal conclusions to all the distinct parts of the replication.

1. Held, on demurrer to the replication to each plea for putting several matters in issue, that the plaintiff might treat the first plea, with respect to the chattels, as pleaded *separately* to each count.

2. That the plaintiff was entitled to divide each plea, and to *reply severally* as to the different parts of each, and as to different chattels covered by each.

3. But that *de injuriâ* could not be replied as to any chattels to the first plea, which alleged *title* in the close.

4. That *de injuria* might be replied as to the chattels to the second plea, which alleged only *possession* of a close.

——, in the county aforesaid, (*q*) and because the said goods and chattels, before and at the said time when, &c., were wrongfully in and upon the said close, encumbering the same, and doing damage there to the defendant, he the defendant at the said time when, &c., seized and took the said goods and chattels in the said close, and removed and carried the same to a small and convenient distance, (*r*) to wit, in the said parish, *and there left the same* †*for the plaintiff's use*, (*s*) being the trespasses in the introductory part of this plea mentioned; and this the defendant is ready to verify; wherefore he prays judgment, if the plaintiff ought to maintain his aforesaid action thereof against him, &c.

### 4. *Payment of Money into Court.*

[In Trespass or Trover for taking or injuring goods, the defendant may, *by leave* of the Court or a judge, plead payment of money as damages into Court, either as to the whole or part of the cause of action; see general Form in Trespass, *ante*, 727; in *Assumpsit*, *ante*, 368, 370; Forms 8 and 9, and notes thereon; and see *ante*, 651.]

## PROCESS.—SHERIFFS.

### *Justification under a Fieri Facias against the Plaintiff's Goods.*

[See Form, &c. *post*, "Trespass to *Realty*," "Process.—Sheriff." It is clear that this defence must be pleaded specially, see *ante*, 699, notes (*z*), (*a*); and see Form, *id.*, of a justification by a sheriff, under a *fi. fa.* against the goods of a *third person*, who had fraudulently assigned to the plaintiff.]

## III. REALTY.

### *Plea of Not Guilty, in Trespass to Realty.* (*t*)

(*q*) If in another county, see *ante*, 734, note (*t*). It is not necessary to *name* the close; see Bond *v.* Downton, 2 Ad. & E. 26.

(*r*) If A. wrongfully place goods in B.'s building, B. may lawfully go upon A.'s close adjoining the building for the purpose of removing and depositing the goods there for A.'s use; Rea *v.* Sheward, 2 M. & W. 424.

(*s*) This plea is disproved on a replication *de injuriâ*, if it be shown that defendant locked up the goods in the place where they were seized, and took away the key; Jones *v.* Lewis, 7 C. & P. 343.

(*t*) See Forms, &c. *ante*, 725, 726. By the New Rules, "In actions of trespass *quare clausum fregit*, the plea of *not guilty* shall operate as a *denial* that the defendant committed *the trespass alleged*

## †2. *Pleas denying Plaintiff's Title.* (*u*).

### 1. *Plea, in Trespass quare clausum fregit, that the House or Close is not the Plaintiff's.* (*x*)

And for a further plea in this behalf, (*y*) the defendant saith that the

*in the place mentioned*, but not as a denial of the plaintiff's possession or right of possession of that place: which, if intended to be denied, must be traversed specially;" *ante*, 725. Not guilty, in this action, therefore admits the plaintiff's *title and possession*, and simply denies the alleged fact, that the defendant, by himself or his servant or cattle, as the charge may be, committed the trespasses laid in the declaration; and no *excuse* or *justification* can be set up. It may be doubtful whether the plea of not guilty now enables the defendant to avail himself of a *misdescription* of the *locus in quo;* and whether in such case a plea denying the plaintiff's *possession*, or traversing that the close is the "close of the plaintiff" is not essential in order to take the objection. Mr. Justice Patteson appears to have been of the latter opinion in Lempriere *v.* Humphrey, cited *ante*, 721, note (*g*), at least, according to the report of that case in 4 N. & M. 635; 1 H. & W. 170; though it would seem from the report in 3 Ad. & E. 186, that his lordship only stated, that the plaintiff would fail on a traverse of possession, if he misdescribed his close. From the report of the case in N. & M. and H. & W., it would appear that Mr. Justice Littledale considered that a variance in describing the close was put in issue by the plea of not guilty. From the wording of the New Rules it appears to have been intended that this should be the operation of the plea, and see Rosc. Tr. 55, 56. But until the point is more satisfactorily settled, it will be judicious to plead not guilty, and also a plea traversing the plaintiff's possession, in order to sustain this objection.

As to *costs* where the plaintiff recovers less than 40*s.* damages, and not guilty is pleaded in trespass to land, &c.; see *ante*, 714, note (*a*). Where all the trespasses laid can clearly be proved, it is not advisable to plead not guilty, as in general it subjects the defendant to the costs of the issue joined thereon if plaintiff succeed. And the pleading not guilty in trespass *quare clausum fregit* gives the plaintiff the right to begin, and the reply at the trial. But in trespass *quare clausum fregit*, if the defendant plead as to the coming with force and arms, and whatever else is against the peace not guilty, and as to the residue of the trespasses a justification, which is denied by the replication; Hodges *v.* Holder, 3 Campb. 366, per Bayley, J.; Jackson *v.* Hesketh, 2 Stark. N. Pri. 518, per Bayley, J.; the defendant has a right to begin. So in trespass for entering the plaintiff's dwelling-house and taking his goods, on a plea justifying the trespass by proceedings under a commission of bankrupt, and replication taking issue on the act of bankruptcy, the defendant, not having pleaded the general issue, has a right to begin; Cotton *v.* James, 1 Moody and M. 273, 278; 3 Car. & P. 505, S. C. per Lord Tenterden, Ch. J. So in trespass *quare clausum fregit* where *liberum tenementum* was pleaded and no general issue, the defendant was holden to be entitled to begin; Pearson *v.* Coles, 1 Moody & R. 206, per Patteson, J.; Tidd, N. P. 505.

(*u*) The action of trespass is peculiarly a *possessory* remedy, and therefore the plaintiff must have exclusively the *actual* or *constructive possession* of the house or land at the time the trespass was committed, in order to sustain the action; and proof of *title* will not dispense with evidence of actual or constructive possession in the plaintiff. Thus, a lessee before entry cannot support trespass; nor can an heir who has not entered sue an abater in that form of action; see 2 Stark. Ev. 2d ed. tit. Trespass, 803; 1 Chit. Pl. 6th ed. 175 to 178, 5th ed. 202 to 205. But possession in many cases impliedly follows the property; Hebbert *v.* Thomas, 1 C. M. & R. 861; 1 Gale, 53; Rex *v.* Mayor of London, 4 T. R. 26; and the party entitled is constructively in possession and may sustain trespass; id. This applies, it would seem, particularly in those cases where from the nature of the property constant manual occupation cannot well be had. Thus the lord of a manor claiming the wastes, or the owner of the soil of a public highway, may maintain trespass against persons injuring the soil, &c. of the waste or highway, on proof of title, without showing actual possession, it not being proved by defendant to have been at the time in another person; Lade *v.* Shepherd, 1 Wils. 110; Mayor of Northampton *v.* Ward, *id.* 107; 2 Stark. Ev. 2d ed. 804.

And a party having the strict legal title and *possessory right*, may, *by entry*, &c.

said †close in which, &c., (z) was not nor was any part thereof at the said times when, &c., or either of them, nor is it the close of the plain-

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acquire a sufficient constructive possession to enable him to sustain trespass against a wrongdoer in actual possession. Thus in Butcher *v.* Butcher, 7 B. & C. 399, where the plaintiff having the legal title entered on the land (by going thereon and beginning to plough, &c.) with intent to take possession, although he did not declare that such was his intention, it was held he might maintain trespass against a person wrongfully in possession at the time of the entry, and who without quitting possession desired the owner to go away, and in fact continued his wrongful possession afterwards. And in these cases entry, &c. upon part and parcel of the estate in the name of the whole, gives sufficient constructive possession of the whole for this purpose; Bulwer *v.* Bulwer, 2 B. & Al. 470.

It is therefore evident that in trespass a question of *title* may be, and often is, raised and decided, although *ejectment* is more commonly resorted to and is generally more appropriate for the purpose.

Prior *actual possession* (see Devett *v.* Brown, 5 Bing 7; Hall *v.* Davis, 2 C. & P. 33; Dyson *v.* Collick, 5 B. & Al. 601; 1 Chit. Pl. 5th ed. 203, 6th ed. 176,) is of itself sufficient to enable the possessor to maintain trespass against a wrong-doer, that is a party who enters and cannot prove a superior or better title or possessory right in himself, or in another person who can be proved to have authorized his entry. In other words, in trespass possession is *primâ facie* evidence of title, and the plaintiff having prior possession and actual occupation at the time, need prove no title except in answer to proof of title on the part of his adversary. And actual possession even under a void lease, or of crown land, suffices for this purpose; Graham *v.* Peat, 1 East, 244; Chambers *v.* Donaldson, 11 East, 63; Harper *v.* Charlesworth, 4 B. & C. 574; Catteris *v.* Cowper, 4 Taunt. 547; Heath *v.* Milward, 2 Bing. N. C. 98; 2 Scott, 160; 1 Hodg. 198, S. C.

In his declaration in trespass, the plaintiff claims title by charging that the defendant committed the trespasses in a close "of the plaintiff."

This allegation imports that the plaintiff has such a title or right in possession as enables him to sustain trespass under the circumstances of the case. It is not an averment calling for proof of a strict legal title to, or property in, the close, it may be sustained by evidence of mere possession, unless rebutted by proof from the defendant of a better possessory right, &c.; Heath *v.* Milward, *ubi supra*. Before the New Rules the defendant was able to dispute the plaintiff's possession and possessory title, under the plea of *not guilty*. But we have seen that this effect of the plea is now destroyed; *ante*, 725. The pleas now in use are—1st. That the close was *not the close of the plaintiff*, (*ante*, 753, Form 1); 2dly. That the plaintiff was not *possessed* of the close, (*post*, 755, Form 2); 3dly. *Liberum tenementum*, (*post*, Form 3); 4thly. A special plea, showing a *possessory title* in the defendant, &c. and giving the plaintiff *color*, (*post*, 757, Form 6.)

1. The *first* plea is usual and proper in cases where the defendant wishes to put the plaintiff on proof of his possessory title to, and, it seems, of his actual or constructive possession of the *locus in quo* described in the declaration, but as we have just seen the words in the declaration "the close of the plaintiff," mean only that the plaintiff has such an interest and right as enable him to sustain trespass, and the plea in denial is therefore negatived if plaintiff prove possession only, against a wrong-doer; Heath *v.* Milward, *supra*. *Semble*, defendant may set up title on this plea; Doe *v.* Huddart, 2 C. M. & R. 316. In Hughes *v.* Hughes, 2 C M. & R. 663; 1 Tyr. & G. 4; Parke, B. said, "There is one case in which it might be a matter of doubt whether the freehold came in question, where there was a plea that the close was not the close of the plaintiffs." Probably a question of freehold might be raised on this plea, in cases where the defendant showed a *prima facie* title; for it is conceived that the traverse puts the plaintiff on proof of such a title as he might have been compelled to prove upon not guilty under the former system. But where the defendant claims *title*, it will be judicious to plead it specially.

2. The *second* plea, denying plaintiff's *possession*, was held good in Fleming *v.* Cooper, 5 Ad. & E. 221, *post*, 755, note (*a*). It puts him, it seems, on proof of *possession* only, actual or constructive, (see *supra*,) and would appear not to question the *title*. It is a proper plea where the plaintiff, though the owner, has let the *locus in quo* and has therefore only a reversionary interest, (but the first plea would also be appropriate in such a case); or where the *locus in quo* is *misdescribed* in the declaration; *ante*, 752, note (*t*); or the defendant himself has the possession and plaintiff has not entered and gained a sufficient constructive possession to sustain this action; see *supra*.

3. The *third* plea, or *liberum tenementum*, (the *common bar*, as it has been called,) although often complained of and dis-

tiff as in the said †declaration alleged; and of this the defendant puts himself upon the country, &c.

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couraged, and although the common law commissioners recommended its abolition, still subsists, and is a valid plea. It is indeed expressly recognized in the New Rules in the instance given, that "in trespass *quare clausum fregit*, pleas *of soil and freehold* in the defendant in the *locus in quo*, and of the defendant's right to an easement there, are distinct and are to be allowed." This plea (Form 3, *post* 755,) it will be observed, states, contrary to the general rule of pleading, a *general freehold title* without showing its commencement, and it is supported by proof of *any* estate of *freehold*, whether in fee, in tail, or for life only, and whether in possession or expectant on the determination of a *term* of years; but it does not apply to the case of a freehold estate in remainder or reversion, expectant on a particular estate of *freehold*, nor to *copyhold* tenure; 1 Saund. 347 d, note 6; Steph. 3d. 316; 1 Chit. Pl. 5th ed. 541, 6th ed. 503; nor is the plea sustained by evidence of a tenancy in Common; Voyce *v.* Voyce, Gow. R. 201. This plea admits the plaintiff's *poss.ssion* of the close described in the declaration, but not that his possession is *rightful*; Lempriere *v.* Humphrey, 3 Ad. & E. 186, per Patterson, J.; 1 H. & W. 181. The defendant has to begin at the trial on this plea, if he has not pleaded not guilty. As to its effect as to *costs*, see *ante*, 714, note (*a*). The mode in which the plaintiff should *reply* to this plea, is noticed *post*, 756, Form 5, and note (*h*).

The plea of *liberum tenementum* was much in use before the New Rules, as a mode of compelling the plaintiff to *new assign*, giving a particular description of his close, for if the plaintiff's close were not specifically described in the declaration by name, abuttals or other local description, the defendant succeeded on issue joined on *liberum tenementum* if he had another close in the parish; 1 Saund. 299 *b*, c, note 6. But the New Rules have, as already pointed out, *ante*, 721, note (*g*), rendered such new assignment unnecessary for the above purpose, (and have consequently brought *liberum tenementum* much into disuse,) by rendering it essential that the plaintiff's close should be described in the *declaration*. A new assignment describing the close, would even now be necessary in the above case, where the declaration omits to describe the close as required by the New Rules, and *liberum tenementum* is pleaded; see form 3 Chit. Pl. 5th ed. 1216 This plea is useful and proper (in lieu of, or in addition to, the plea that the close is not the plaintiff's,) in cases where the defendant justifies as the servant of the freeholder, and the proof of authority may be doubtful, as it compels the plaintiff to admit the seizin, *or* the authority of the defendant as servant of the freeholder to commit the trespasses; *post*, 756.

And where in trespass to land, the removal of plaintiff's goods is also charged and defendant claims *title* to the land, he should plead it and justify the removal; and it seems to be insufficient, *as to the goods*, to plead only that the close was not the plaintiff's; see Form 3, *infra*, note (*y*). Where the *freehold* title was in the defendant, the plaintiff cannot safely *deny lib. ten.*, but should specially show his possessory interest by demise, &c.

4. The *fourth* plea, showing specially a *possessory* title in the defendant derived from the freeholder, whether he be the plaintiff or another person, (see Form 6, *post*, 757,) is proper where it is important to compel the plaintiff to admit part of the defendant's title or case. This plea was bad, before the New Rules, as amounting to the *general issue*, and is now it seems defective as amounting so an *argumentative traverse* that the close was the plaintiff's, unless *color be given*, that is, unless the plaintiff be admitted to have had some color of right to the close; see the form *post*, 757, and Steph. 3d ed. 207 to 212. This special plea forces the defendant to admit the freehold title as laid, *or* the demise; or to confess both, alleging a prior demise, &c. from the freeholder, &c.; see *post*, 758, note (*n*).

(*x*) As to this plea, see *ante*, 754, note (*u*). Forms, Howell *v.* Thomas, 7 C. & P. 342; Haigh *v.* Belcher, id. 389; Heath *v.* Milward, 2 Bing. N. C. 98; 2 Scott, 160; 1 Hodges, 198, S. C. In the latter case it was held that evidence of possession entitles plaintiff to a verdict on this plea, the defendant not showing a possessory right in himself, &c.; see further *ante*, 753, note (*u*).

(*y*) If the declaration charge the removal of chattels not stated to be parcel of, or belonging to, the close, here *except those* trespasses, and commence the plea with *actio non;* and then in another plea as to the chattels deny, as to the goods, that they were the chattels of the plaintiff, (see Form 2, *ante*, 749,) if they were not so; or, if they were, plead as to the goods that defendant was possessed of a close, and because the goods were there doing damage, &c., defendant removed them, as *ante*, 751, Form 3; or the defendant might plead title, giving color and justifying the removal, see *id.* and Form 6, *infra*. In trespass for entering a house and taking goods, if defendant claim both, he may plead that the house and goods were not, nor was either of them the house and goods of

### 2. *Plea denying the Plaintiff's Possession.* (*a*)

And for a further plea in this behalf, [*as to pleading to part of the trespasses see ante*, 726, Form 2, and *infra*, *notes (y) and (z)*,] the defendant saith that the plaintiff was not at the said times when, &c., or either of them, possessed of the said close in which, &c., or any part thereof, as in the said declaration alleged, and of this the defendant puts himself upon the country, &c.

### 3. *Liberum Tenementum* (*b*).

And for a further plea in this behalf, the defendant says that the said close [*or if there be several closes, (c)*" the said closes,"] in which, &c., at the said several times when, &c., was and now is the close, soil and freehold [*or* " were and now are the closes, soil and freehold, and each of them was and is the close, soil and freehold,"] of the defendant, wherefore the defendant in his own right at the said several times when, &c., broke and entered the said close in which, &c.,* and committed therein the said several supposed trespasses in the declaration mentioned. [*If the declaration charge the seizure and asportation of chattels not stated to belong to the close, and which are admitted to be plaintiff's property, state at the asterisk*, " and with feet in walking," *&c. justifying all the trespasses to the close in the words of the declaration*, " And because the said [gates, goods and chattels] in the declaration mentioned before and at the said times when, &c., had been wrongfully put and placed, and were at those times wrongfully in and upon the said close in which, &c. encumbering the same and doing damage there to the defendant, he the defendant at the said time when, &c., seized the said gates [*&c.*], and took and removed them from the said close in which, &c., to a small and convenient distance in the said parish and there left the same for the plaintiff's use, (*d*) being the several trespasses in the declaration mentioned ;"] and this the defendant is ready to verify. (*e*)

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plaintiff, *modo*, *&c.*; see Form, Haigh *v.* Belcher, 7 C. & P. 389.

(*z*) Where the cutting grass, hedges, gates, &c. is also charged, it is not unusual, though the declaration show they belong to the close, to aver here " and the said *grass* [*&c.*] were not [&c.] the [close] *grass* [*&c.*] of the plaintiff," as in the declaration, &c.; Heath *v.* Milward, 2 Bing. N. C. 98.

(*a*) As to this plea, see *ante*, 754, note (*u*). The above form of plea, concluding to the country, was held good on special demurrer in Fleming *v.* Cooper, 5 Ad. & E. 221; see further, *ante*, 754, note (*u*).

(*b*) See as to this plea, *ante*, 754, note (*u*).

(*c*) The issue on this plea is to be taken distributively, and defendant may succeed as to one close and plaintiff as to another; Phythian *v.* White, 1 M. & W. 216; 1 Tyr. & G. 515, S. C.

(*d*) See *ante*, 752, note (*s*). Replication excess of force as to the goods; Vivian *v.* Jenkin, 3 Ad. & E. 741.

(*e*) As to counsel's signature, *ante*, 21, note (*g*).

4. *Another Form—justifying as the Servant of the Freeholder—and where the Gates, &c. are also claimed as part of the Freehold.*

The defendant, by —— his attorney, says that the said close in which, &c., in the declaration mentioned, before and at the said several times when, &c., in the declaration mentioned, was the close, soil and freehold of one E. F., [and that the said gates, locks, staples, hinges, hedges, fences, plants, vegetables, herbage, trees ond underwood, [*as in the declaration*,] before and at the said several times when, &c., were respectively affixed to the soil of the said close, and parcel of the said freehold of the said E. E., (*f*)] wherefore the defendant as the servant and by the command of the said E. F., (*g*) at the said several times when, &c., broke and entered the said close in which, &c., and committed therein the said several supposed trespasses in the declaration mentioned; and this the defendant is ready to verify, &c.

5. *Replication to a Plea of Liberum Tenementum—denying it.* (*h*)

And as to the said —— plea, the plaintiff saith that the said [close, *or* "closes,"] in which, &c., was not at the said times when, &c., or either of them the [close,] soil and freehold [*if several closes say*, "nor was either of them the close, soil and freehold,"] of the defendant as in the said —— plea alleged; and this the plaintiff prays may be inquired of by the country, &c.

†6. *In Trespass Quare Clausum fregit:—Plea, that Defendant was Tenant to the Freeholder, giving the Plaintiff color.*(*i*)

And for a further plea in this behalf, [*or if part only of the trespasses*

(*f*) This form is not usual, but is sometimes adopted.

(*g*) If the freeholder and his servant plead together, say, "the defendant in his own right, and the defendant as the servant, &c." The plaintiff may reply, denying that defendant was the servant or had the authority of the freeholder; Chambers *v.* Donaldson, 11 East, 65.

(*h*) *Ante*, 754, note; or plaintiff may reply a demise.

(*i*) See as to this plea, *ante*, 775, note (*u*); Forms, &c. Stephen Pl. 3d ed. 207, 211; 3 Chit. Pl. 6th ed. 1017, 5th ed. 1101; Com. Dig. Pleader, 3 M. 40: Vivian *v.* Jenkin, 3 Ad. & E. 742; Special Form, Pythian *v.* White, 1 M. & W. 216; 1 Tyr. & G. 515; see Bees *v.* Williams, 2 C. M. & R. 582: 1 Tyr. & G. 23; the form there appears to be bad for not giving the plaintiff color. To a plea of *liberum tenementum*, Replication, that the house was formerly the freehold of the trustees of a charitable fund and school, who appointed plaintiff schoolmaster, in which character he occupied, &c.; Wilkinson *v.* Malin, 2 C. & J. 636. In trespass to land, if the defence be that the plaintiff who has the freehold is out of possession by a demise, it is for the defendant to rebut the presumption that possession follows the freehold, by clearly proving a demise. If the *locus in quo* (a yard) be surrounded by several houses demised by the plaintiff, the mere fact, that the tenants of the houses use the place in which, &c. for some purposes referrable to an easement, is no evidence of a demise of the land or yard with the houses; and there being no evidence whether the yard formed part of the demise or not, the Court held, that the judge ought not to have left it to the jury to say whether the landlord, at the time of the demise of the houses, had reserved

*be justified, confine the plea accordingly*], the defendant says, that one J. S. before the said time when, &c. to wit, on the —— day of ——, A. D. ——, was seised in his demesne as of fee of the said [close] in which, &c. and being so thereof seised, before the said time when, &c., to wit, on the day and year last aforesaid, by a certain indenture then made between the said J. S. of the one part, and the said defendant of the other part, (one part of which said indenture, sealed with the seal of the said J. S, the defendant now brings here into Court,) the said J. S. did demise unto the defendant the said close in which, &c., to hold the same from the —— day of —— then last past, to the full end and term of —— years thence next ensuing, as by the said indenture appears, [*or if the defendant claim as yearly tenant state*, "and the said J. S. being so seised before the said time when, &c., to wit, on [*&c.*] demised the said close in which, &c. to the defendant, to have and to hold the same to the defendant for one year then following, and so on from year to year for so long a time as the said J. S. and the defendant should respectively please."] By virtue of which demise the defendant afterwards, before the said time when, &c., to wit, on [*&c.*], entered upon the said close in which, &c., and became and was possessed thereof for the term aforesaid, and the plaintiff claiming the said close in which, &c., by color of a certain charter of demise to him thereof made for the term of his life, by the said J. S. (*k*) long before the said demise by him to the defendant in form aforesaid, made (whereas nothing of or in the said close in which, &c. ever passed, (*l*) by virtue of that charter), before the said time when, &c. entered into and upon the said close in which, &c., and thereupon the defendant afterwards, to wit, at the said time when, &c., entered into and upon the said close in which, &c., in and upon the plaintiff's possession thereof, and committed the trespasses in the declaration mentioned, (*m*) as it was lawful for him to do for the cause aforesaid; and this the defendant is ready verify.

### 7. *Replication thereto.*(*n*)

And the plaintiff, as to the said —— plea, saith, that the said J. S. did

the yard; the question being whether he had *demised* it, not whether he had *reserved* it; Hebbert *v.* Thomas, 1 C. M. & R. 861; 1 Gale, 53, S. C. As to the issue being taken distributively, and plaintiff succeeding as to one close, and defendant as to the other, where there are several closes, in the above instance, see Pythian *v.* White, *ubi supra*. See in general as to the mode of claiming title, and the description of the different estates, Index "Covenant."

(*k*) This is the usual form of giving color, and should not be departed from; see Steph. 3d ed. 213, 214; see precedent and explanation, *id.* 211, citing 9 Wentw. Index, xxxvii.; 2 Edw. 4, 8. The defect in the title given by this color is, that the charter, though a charter of demise *for life*, is not pleaded as a *feoffment*, and does not appear to have been accompanied by livery of seisin; Steph. 212.

(*l*) The words "into the possession of the plaintiff," are here inserted in the form in Stephen, but are not in 3 Chit. Pl. and other modern forms, and seem to be unnecessary.

(*m*) If the removal of goods be justified, see form 3, *ante* 756.

(*n*) The replication cannot be *de injuria* generally; the plaintiff must reply, denying the seisin in fee, *or* the demise; Vi-

not demise the said close in which, &c. to the defendant, as in that plea alleged; and this the plaintiff prays may be inquired of by the country, &c.

8. *Plea in Trespass for entering a Colliery, &c., that the Defendant demised it to the Plaintiff, with a power of re-entry if the Rent were not paid, and justifying under such Power.*

And for a further plea to the first count of the declaration, the defendant says, that before the said times when, &c. or either of them, to wit, on [*&c.*], by a certain instrument in writing then made between the defendant of the one part, and the plaintiff of the other part, the date whereof is the day and year last aforesaid, he the defendant demised to the plaintiff the said colliery and coal mine in which, &c., for the term of three years from the date of the said instrument in writing and demise, he the plaintiff paying therefore as rent and galeage, the sum or consideration of 1*s.* 2*d.* per ton upon all coal which should be worked therefrom [*&c.*] and it was and is in and by the said instrument in writing and demise stipulated, provided, and agreed upon by and between the said parties thereto, that the ton upon which the galeage rents aforesaid should be paid, should at all times be and consist of 2240*lbs.* weight, and that such rents and galeage should be paid by the plaintiff to the defendant in cash or good and approved trade bills, on or about the —— day of every month, upon all coal worked from the said colliery during the previous month, and that the plaintiff should be bound to work or pay for 30 tons of coal per day at least, at the rate of 1*s.* 2*d.* per ton aforesaid, and †that in case of default in payment of such galeage rents and royalties at the times in the said instrument and demise appointed for payment thereof as aforesaid, or within six days thereof, or in case of the breach of any of the agreements or stipulations contained in the said instrument and demise on the part of the plaintiff to be observed and performed, he the defendant should have and was to have full liberty and authority to re-enter into possession of the said colliery, and to terminate and put an end to the said instrument in writing and the said demise, giving three days previous notice in writing to him the plaintiff of such his the defendant's intention; and the defendant further saith, that afterwards, and after the making of the said instrument and demise, to wit, on [*&c.*], the plaintiff entered into and upon and became and was possessed of the aforesaid colliery, as tenant thereof to the defendant upon the terms aforesaid, and continued to be such tenant until he the defend-

vian *v.* Jenkin, 3 Ad. & E. 741; cited *ante*, 751, note (*p*); or he may reply a *prior* demise to him from the freeholder, *or* that the demise to defendant was surrendered, &c. and a subsequent demise by the freeholder to him, the plaintiff. So the plaintiff may reply a sub-demise by the defendant to the plaintiff before the trespasses were committed; concluding with a verification in the last three instances.

ant entered into and upon the said colliery, and evicted the plaintiff therefrom in manner and form and for the causes hereinafter mentioned; and the defendant further saith, that afterwards, and after the making of the said instrument and demise, and whilst he the plaintiff was such tenant and so possessed of the said colliery as aforesaid and long before the expiration of the term of years therein mentioned, to wit, on [*&c.*] being the 8th day of a month of the said term and tenancy in the said instrument in writing mentioned, a certain large sum of money, to wit, the sum of £—— of the rent and galeage in the said instrument and demise mentioned, and thereby reserved and made payable to the defendant, being at and after the aforesaid rate of 1*s.* 2*d.* per ton, upon 30 tons of coal per day, for and in respect of and during twenty-eight preceding days of the said term and tenancy, down to and inclusive of the last day of the next preceding month, that is to say, the month of —— in the same year aforesaid, became and was due and payable in cash or good and approved trade bills, on or about the aforesaid —— day of ——, A. D. ——, by and from the plaintiff to the defendant, according to the terms, tenor, and effect of the said instrument and demise, and in manner therein mentioned and provided for; and the defendant further saith, that although a reasonable time from and after the said —— day of ——, A. D. ——, for the payment of the said arrears of rent and galeage in cash, or good and approved trade bills, and six days from the expiration of such reasonable time respectively elapsed long before the giving of the notice by the defendant next hereafter mentioned, and although before the giving of such notice, and after the expiration of such reasonable time from and after the said —— day of —— as aforesaid, to wit, on the —— day of the said month of —— in the year aforesaid, he the plaintiff was requested by the defendant to pay and discharge the said arrears of rent and galeage in cash, or good and approved trade bills, yet the said arrears of rent and galeage at the time of giving the said notice hereinafter mentioned, were and remained wholly due, in arrear and unpaid, and the same arrears or any part thereof had not then been paid in cash, or good and approved trade bills or otherwise howsoever; and the defendant further saith, that thereupon heretofore and after the expiration of the said six days from the aforesaid lapse of such reasonable time, from and after the said —— day of ——, in the year of our Lord ——, for the payment as aforesaid of the said arrears of rent and galeage, and during the continuance of the said term and tenancy, and more than three days before and previous to the re-entry and eviction hereinafter mentioned, to wit, on the —— day of ——, A. D. ——, he the defendant gave to the plaintiff notice in writing of his the defendant's intention and determination, after three days from the date and giving thereof, to re-enter into possession of the said colliery and coal mine, and to put an end to the said demise and instrument, holding him the plaintiff liable for the payment and fulfilment of all obligations due and accruing, and which should be due in respect of the same

up to the —— day of —— aforesaid, being the third day from and after the date and giving of the said notice; and the defendant further saith, that the plaintiff did not at any time within three days from and after the giving of the said notice, or before the re-entry and eviction hereinafter mentioned, pay or discharge the said arrears of rent and galeage in cash, or good and approved trade bills or otherwise howsoever; but the said arrears and every part thereof, at the time of the said re-entry and eviction hereinafter mentioned, were wholly due, in arrear and unpaid, contrary to the aforesaid provisions of the said demise in that behalf, and thereupon, and more than three days from and after the giving of the said notice in writing to the plaintiff, and while the said arrears of rent and galeage remained and were wholly due and unpaid in cash, or good and approved trade bills, to wit, on the day and year in the said first count mentioned, he the defendant peaceably, quietly, and without resistance re-entered into possession of the said colliery and coal mine, in pursuance of and compliance with the said notice in writing to that effect, and for the purpose of terminating and putting an end to the said instrument in writing and demise, which were then thereby determined, and then and from thenceforth he the defendant retained possession of the said colliery and coal mine for his own use, and worked the same for his own use and benefit, as it was lawful for him to do, for the causes in this plea aforesaid, which are the same alleged trespasses in the said first count mentioned; and this the defendant is ready to verify:—[*or instead of this conclusion, the plea may end thus:*—" without this, that at the time of the committing of the said alleged trespasses in the said first count mentioned, or any or either of them or any part thereof, the said colliery and coal mine in which, &c. were or either of them was the colliery and coal mine of the plaintiff in manner and form as in the said first count is in that behalf alleged; and of this the defendant puts himself upon the country, &c." (*o*)]

## COMMON OF PASTURE.

1. *Plea in Trespass for entering Land with Cattle, breaking down Fences, &c., justifying under a right of Common of Pasture by virtue of Thirty Years enjoyment, by the Occupiers of a Farm.* (*p*)

And for a further plea in this behalf, [*or if some of the trespasses are not justified confine the plea to those that are so,*] the defendant saith that

(*o*) By the New Rules, H. T. 4 Will. 4, reg. 13, "all special traverses, or traverses with an inducement of affirmative matter, shall conclude to the *country*; provided that this regulation shall not preclude the opposite party from pleading over to the inducement when the traverse is immaterial." Where the object is to force the plaintiff to admit part of the plea it is better to conclude with a verification without the *absque hoc.*

(*p*) This plea is founded on the Prescription Act, 2 & 3 W. 4, c. 71, the provisions of which in relation to rights of

for the full period of *thirty (q)* years next before the commencement of this suit, (*r*) the respective occupiers for the time being of a certain messuage, farm and land with the appurtenants, situate in the parish aforesaid [*if the fact be so,*] in the county aforesaid, have actually had, used and enjoyed, and been accustomed to use and enjoy, as of right, and without interruption, common of pasture in, upon and throughout the said close in which, &c., for all (*s*) their commonable cattle, levant and couchant, in and upon the said messuage, farm and land with the appurtenants, every year at all times of the year, (*t*) as to the said messuage, farm and land with the appurtenants belonging and appertaining; and the defendant further saith, that during part of the said period of thirty years, to wit, before and at the said several times when, &c., he was the occupier of the said messuage, farm and land with the appurtenants, †wherefore the defendant (*u*) at the said times when, &c., entered into the said close in which, &c., in order to turn and put, and did then turn and put into and upon the same his the defendant's own commonable cattle, levant and couchant, in and upon the said messuage and land, with the appurtenants, of the defendant, to wit, the said cattle in the said declaration mentioned, to use the said common of pasture of the defendant there, and in so doing the defendant at the said times when, &c., with his feet in walking unavoidably trod down, trampled upon, consumed and spoiled a little of the grass and herbage then growing and being in the said close in which, &c., and subverted and spoiled a little of the earth and soil of the said close in which &c., [*as in declaration,*] and the defendant with the said cattle did then depasture and consume other the grass and herbage there then growing and being; and because before and at

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common, have been already cited, *ante*, 509, note (*p*); 498, note (*c*). The form of plea is sanctioned by the 5th section of the act, which, with the decisions thereon, will be noticed hereafter; *post*, 774, note (*k*), tit. "Ways." As to rights of common in general, and the remedy by action on the case for disturbing such rights, see *ante*, 309, note (*p*). See the forms of pleas in trespass of prescriptive rights of common, prescribing in a *que estate*, &c., 3 Chit. Pl. 5th ed. 1109, 6th ed. 1025; Arlett *v.* Ellis, 7 B. & C. 346; 9 *id.* 672; Tapley *v.* Wainwright, 5 B. & Ad. 395; and see various pleadings and points decided thereon, *id.* But the former mode of pleading is not only now unnecessary, but is less advantageous to the defendant. See Form, 5 Ad. & E. 414, 415.

(*q*) Add another plea stating *sixty* years, if there be evidence to support it.

(*r*) *Post*, 778, notes (*m*), (*n*).

(*s*) "5. And where in an action of trespass *quare clausum fregit*, the defendant pleads a right of *common of pasture* for divers kinds of cattle, *ex. gr*, horses, sheep, oxen and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found, and for the plaintiff in respect of the trespasses which shall not be so justified. 6. And in all actions in which such right of way or common as aforesaid, or other similar way, is so pleaded that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively;" New Rules, "V. In Trespass."

(*t*) If the claim be limited to particular periods, state the fact accordingly; see *ante*, 510, note (*s*). By the New Rules, "Pleas of right of common at all times of the year, and of such right at particular times or in a qualified manner, are not to be allowed."

(*u*) If the plea be by the occupier's servant, state above that "one E. F" was the occupier; and allege that the defendant "as the servant, and by the command of the said E. F." at the said times, &c., and make the necessary alterations afterwards.

the said times when, &c., the said close in which, &c., had been and was wrongfully enclosed with and by means of the said fences and gates [*according to the declaration*,] in the said declaration mentioned, so that, without breaking down, pulling down, prostrating and removing the said fences and gates, the defendant could not use or enjoy his said common of pasture in, upon and throughout the said close in which, &c., in so ample and beneficial a manner as he otherwise might and would and ought to have done, the defendant at the said times when, &c., broke down and prostrated the said fences and gates, and took and removed the same to a small and convenient distance, and there left the same for the defendant's use, doing no unnecessary damage to the plaintiff on the occasions aforesaid, as he lawfully might for the cause aforesaid, which are the supposed trespasses [*add*, "in the introductory part of this plea mentioned, and," *if the plea be not pleaded to the whole declaration*,] whereof the defendant hath above complained against the defendant; and this he is ready to verify.

### 2. *Replication thereto, denial of the Thirty Years enjoyment uninterruptedly as of Right.* (x)

And as to the said —— plea, the plaintiff saith that for the full period of thirty years next before the commencement of this suit, and before and at the said times when, &c., the respective occupiers for the time being of the said messuage, farm and land, with the appurtenants, have not actually had, used or enjoyed, or been accustomed to use or enjoy, as of right and without interruption, common of pasture in, upon and and throughout the said close in which, &c., for all their commonable cattle, levant and couchant, in and upon the said messuage, farm and lands, with the appurtenants, every year, at all times of the year, as to the said messuage, farm and land, with the appurtenants belonging and appertaining, in manner and form as the defendant hath in his said —— plea alleged; and this the defendant prays may be inquired of by the country, &c.

## DISTRESS.

### 1. *To a Declaration in Trespass for entering House and taking Goods, Plea justifying under a Distress for Rent for the locus in quo.* (y)

And for a further plea in this behalf, [*if any trespasses be charged which cannot be justified under a right of distress, confine the plea to those trespasses which can be justified*,] the defendant saith that the plaintiff, before

(x) See decisions, &c., *post*, 775, n. (*k*). a, 6th ed. 1009; Twigg *v.* Potts, 1 C. M.
(y) See forms, 3 Chit. Pl. 5th ed. 1094 & R. 98; Hooker *v.* Nye, id. 258; 4 Tyr.

and at the said time when, &c., held, occupied and enjoyed the said messuage in which, &c., as tenant thereof to the defendant under and by virtue of a certain demise thereof theretofore made, at and under a certain rent, to wit, the yearly rent of [£100] payable [half yearly], to wit, on, [*&c.*] and on [*&c.*], in each year of such tenancy [*state the terms of the tenancy correctly; see ante*, 707, *note* (*l*)]; and the defendant further saith, that before the said time when, &c., to wit, on the [*&c.*], a certain sum of money, to wit, [£50] of the rent aforesaid for a certain time, to wit, [half a year] of the said tenancy, ending on a certain day, to wit, the day and year last aforesaid, became and was due and in arrear from the plaintiff to the defendant, and at the said time when, &c., remained in arrear, whereupon the defendant at the said *first* time when, &c., entered into the said messuage in which, &c. (the outer door of the same being open) to distrain for the said arrears of rent, (*z*) and did then and there distrain the goods and chattels in the said declaration mentioned, then being in the said messuage in which &c., and subject to such distress, as and for a distress for the said arrears of rent, and kept and impounded the same in and upon the said messuage under the said distress for the space of five days, (*a*) and at the expiration of five days from such distress, to wit, on [*&c.*], the defendant removed the said goods and chattels from the said messuage and caused the said goods and chattels to be duly appraised and then sold the same by virtue of such distress, according to the form of the statute in such case made and provided, in satisfaction of the said arrears of rent, and the costs of the said distress and sale, and upon that occasion the defendant necessarily made the said noise and disturbance, and stayed and continued in the said messuage, making such noise and disturbance, for the said space of five days, which are the said supposed trespasses whereof the plaintiff hath above complained; and this the defendant is ready to verify.

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777; Neale *v.* Mackenzie, 2 C. M. & R. 84; 1 Gale, 119, S. C.; see 1 M. & W. 747, S. C., reversing the judgment of the Court of Exchequer; see Welsh *v.* Rose, 6 Bing. 638; 4 M. & P. 484; Whitworth *v.* Smith, 5 C. & P. 250. A right of distress for rent, when exercised *upon* the promises demised, may be given in evidence under the plea of not guilty, by virtue of 11 Geo. 2, c. 19, s. 21; *ante*, 625, note (*l*); but where goods are fraudulently removed, see *post*, 765, Form 4, and the distress is *off* the premises, the plea must be special; id. The general replication *de injuria* to the above plea will be insufficient; *ante*, 728, note (*e*); Hooker *v.* Nye, *supra*; and therefore it is often useful to plead specially to compel the plaintiff to take issue on one part only of the plea, thereby admitting the rest. It seems that a plea of not guilty, and also a special plea of the right of distress, are not allowed to be pleaded together; Neale *v.* Mackenzie, 1 C. M. & R. 61. Form of plea and replication where the declaration charges the removal of fixtures; Twigg *v.* Potts, *supra*.

(*z*) In a case where inner doors were broken, the plea was, "and in order to search for goods therein, and for that purpose did break open, &c., the said doors and locks, the said doors being inner doors and locked with the said locks, and no person being then present, or near, of whom defendant could demand the keys of the said doors, and the defendant not being able to find such keys, although he then and there made diligent search and inquiry for the same;" see Gilb. Distr. 62; 5 Co. 91.

(*a*) If defendant quitted on plaintiff paying the rent and costs, say, "and at the expiration thereof, the defendant quitted the said premises, and re-delivered the said goods and chattels to the plaintiff on his then paying and satisfying the said arrears of rent, and the costs and charges of the said distress."

### 2. *Replication to the above Plea.*

[*De injuriâ* generally cannot be replied; Hooker *v.* Nye, *supra*, 763, note (*y*). The plaintiff may reply, denying the *tenancy*, thus :—"that he did not hold or enjoy the said —— in which, &c., with the appurtenants as tenants thereof to the defendant, in manner and form as in the said —— plea alleged; and of this the defendant puts himself upon the country, &c.;" see Twiggs *v.* Potts, 1 C. M. & R. 89; or may reply payment of the rent; or, it seems, that at the time when, &c. no part was in arrear; see *ante*, 709, Form 2; *or*, (as regards the trespasses to the goods) that they were not *upon* the premises when distrained, *or* were *privileged* goods; see *ante*, 711, Form 7; *infra*, Form 3; *or*, that the plaintiff had no reversionary interest, *ante*, 711, Form 6: or a *tender* of the rent; *id.* Form 8; or an *eviction* by the defendant before the rent became due; see Form and law, Mackenzie *v.* Neale, 1 M. & W. 747, reversing judgment of Exchequer, 2 C. M. & R. 84; 1 Gale, 119; *ante*, 709, note (*q*).

### 3. *To a Plea in Trespass justifying taking Goods under a Distress for Rent :—Replication, that they were privileged, as being on the Premises in the way of Trade.*

And the plaintiff, as to the plea of the defendants by them above pleaded, saith, that before and at the said time when, &c., and before and at the time of the making of the distress in the said plea mentioned, the said G. D. was a coach-painter, and the trade and business of a coach-painter exercised and carried on, to wit, in and upon the said workshops and premises in the said plea mentioned, and being such coach-painter as aforesaid, the plaintiff heretofore, to wit, on the —— day of ——, A. D. ——, sent to the said G. D. the said carriage in the said declaration mentioned, for the purpose of the same being painted for the plaintiff by the said G. D., in the way of his said trade and business for reward to the said G. D. in that behalf, and the said G. D. then had and received the said carriage for the purpose aforesaid, in and upon his said workshops and premises, and the same remained and continued thereon in the way of his said trade and business, and not otherwise, or for any other purpose whatever, until the defendants, before the said carriage was painted, and whilst the same remained in and upon the said workshops and premises for the purpose aforesaid, to wit, at the said time when, &c. of their own wrong, with force and arms seized and took and carried away the said carriage, and refused on demand thereof by the plaintiff to deliver or restore the same to him, and converted and disposed of the same to their own use, as in the declaration alleged; and this the plaintiff is ready to verify.

4. *Plea justifying under a Distress for Rent due for other Premises, the Plaintiff having fraudulently removed his Goods to the locus in quo, to prevent a distress.*

[This must be specially pleaded, *ante*, 625, note (*t*); see Forms, 3 Chit. Pl. 5th ed. 1137 g, 6th ed. 1060; Cartwright *v.* Smith, 1 Mo. & Rob. 284; see in general, 2 Saund. 284 a; Rich *v.* Woolley and Norman *v.* Wescombe, *infra*.

Replication, that the removal was before the rent was due; Rand *v.* Vaughan, 1 Bing. N. C. 767; Watts *v.* Thomas, 2 B. M. T. 1837.

Form of plea, replication, and new assignment, where doors were broken open under a justice's warrant, under 11 Geo. 2, c. 10, s. 7; Norman *v.* Wescombe, 2 M. & W. 349; see also Rich *v.* Woolley, 7 Bing. 651; 5 M. & P. 663, S. C.; but be careful in using that form.]

5. *Other Forms, justifying under a Distress for other Causes.*

[See forms in *Replevin*, *ante*, 705 to 712. Plea, justifying under a justice's warrant for non-payment of a gas rent:—Replication, no summons before conviction; Painter *v.* The Liverpool Oil Gas Light Company, 3 Ad. & E. 433.

Distress for a rate under the warrant of commissioners under an Inclosure Act; Haggerstone *v.* Dugmore, 1 B. & Al. 82.

Seizure for port duties or tolls; 3 Chit. Pl. 5th ed. 1094 c, 6th ed. 1010.

Plea, distress for a fine for contempt of court, viz. Commissioners of Court of Requests; Aldridge *v.* Haines, 2 B. & Ad. 395.

Plea, justifying seizure of defective weights under authority of *leet*; Sheppard *v.* Hall, 3 B. & Ad. 433; Wilcock *v.* Wridler, id. 43.]

## †EASEMENTS.

[It is necessary to justify specially in trespass, where the defence is that the trespasses are excusable or justifiable by virtue of the defendant's right to an *easement*, as a right of common, watercourse, or way, &c. in the *locus in quo*; see Co. Lit. 283; Com. Dig. Pleader, E. 15; 2 Saund. 402, note 1. In *case* for disturbance of an easement, a general form of *declaring* on the plaintiff's *possession* is allowed; see tit. "Ancient Lights," *ante*, 467; "Common," *ante*, 509; "Watercourses," *ante*, 601; "Ways," *ante*, 611; and notes, *id.* Before the late Prescription Act, it was necessary in a *plea* to set forth the title to an easement specially by immemorial prescription in a *que* estate; but that act authorizes a general form of *plea*, founded on and showing only an uninterrupted use or enjoyment of right for the required number of years; see tit. "Common," *ante*, 661;

"Watercourses," *post*, 775, note; "Ways," *post*, 774; and particularly note (*k*), *post*, 774; see tit. "Easements," *ante*, 526; and various claims to easements, 3 Chit. Pl. Index, tit. "Prescription." *De injuria* is not a good replication to a plea claiming an easement in the *locus in quo*; *ante*, 728, note (*e*).]

## FENCES.

***Plea in Trespass for entering Close and with Cattle Depasturing, &c. that Defendant's Cattle escaped from his adjoining Land through the defect of the Fences of Plaintiff's Close, which he ought to have repaired.***

[See Form, 3 Chit. Pl. 5th ed. 1103, 6th ed. 1018; and Forms, &c. referred to in the notes there. *Semble*, that instead of charging that the occupiers have *immemorially* repaired, it is sufficient and better to state only, "that plaintiff before and at the said times when &c. was possessed, and the occupier of the close in which, &c., and by reason thereof, before and at the said times when, &c. of right ought to have repaired, &c. the hedge and fence between, &c." The plaintiff may, it seems, reply *de injuria* generally, as the plea shows matter in *excuse*, and does not claim any interest in plaintiff's land; see *ante*, 728, note (*e*); Cooper *v.* Monke, Willes, R. 54; but *de injuria* only *traverses* the plea; and if the plaintiff's case be that defendant *turned* the cattle on the *locus in quo*; 3 Chit. Pl. 5th ed. 1210, 6th ed. 1134; or that they were wrongfully put and *left* in a highway adjoining &c.; see 2 H. Bla. 522; 2 Saund. 284; or (*semble*) were unruly, &c.; 3 Chit. Pl. *ubi supra*; the replication should be special. In using the *latter* form, conclude, after the special traverse, to the *country*; see *ante*, 761, note (*o*).]

## †FISHERY.

***Pleas in Trespass for entering Plaintiff's Close covered with water and Fishing therein, &c. justifying under private and public rights of Fishery, &c. in the locus in quo.* (*b*)**

(*b*) 3 Chit. Pl. 5th ed. 1106, 1107, 6th ed. 1020, 1021; Chitty's Game Law, *Appendix*; and Forms &c. in the cases referred to in Harr. Ind. tit. "Fish and Fisheries."

## GAME.

1. *Plea in Trespass for Hunting, &c. on Plaintiff's Close, justifying as Servant of the Plaintiff's Landlord, under a reservation of the Game in Plaintiff's Lease.* (c)

And for a further plea in this behalf, the defendant saith, that one W. H. before and at the time of the making of the indenture hereinafter mentioned, was seised in his demesne as of fee of and in the said several closes in the said declaration mentioned, and being so seised, heretofore, to wit, on [*&c.*], by a certain indenture then made between the said W. H. of the first part, and the plaintiff of the other part, which said indenture sealed with the seal of the plaintiff the defendant now brings here into Court, the said W. H. did demise and let unto the plaintiff, among other things, the said several closes in which, &c., except and always reserving out of the said demise unto the said W. H., his heirs and assigns, (amongst other things) the liberties and royalties of fishing, fowling, hawking, and hunting in, upon, and over such closes, to have and to hold the same demised tenements, except as aforesaid, unto the plaintiff for and during the term of twenty-one years, from [*&c.*], as by the said indenture fully appears; and the defendant further saith, that before and at the said several times when, &c., the plaintiff held and was possessed of the said several closes in which, &c. under and by virtue of the said demise, which is still subsisting and unexpired, subject to the said exception and reservation thereout as aforesaid; * wherefore the defendant, as the servant of the said W. H., and by his command, and in his company, aid, and assistance at the said times when, &c., broke and entered the said several closes in which, &c., with the said dogs and horses in the declaration mentioned, being the dogs and horses of the said W. H., for the purpose and in order that the said W. H. might use, exercise, and enjoy therein the said liberty of fishing and hunting, and the defendant as such servant of the said W. H., and by his command and in his company, aid, and assistance as aforesaid, then and there with such dogs and horses hunted and searched for hares and other game in and upon the said closes in which, &c., and killed, seized, took, and carried away the hares in the said declaration mentioned, from and off the said several closes in the said declaration mentioned, such hares being then and there found and started thereon by the defendant on those occasions, and converted and disposed thereof to the use of the said W. H., and upon those occasions the defendant with feet in walking, and with the said dogs and horses then and

(c) See Forms justifying by *grant*, &c. Pickering *v.* Noyes, 4 B. & C. 639; 7 D. & R. 49; Moore *v.* Earl of Plymouth, 1 Moore, 346; 7 Taunt. 614; 3 B. & Ald. 66, S. C.; Harr. Index, tit. "Game;" Game Act, *infra*, note (*p*); Deacon's Game Laws, &c.; Burn. Jus. tit. "Game."

there necessarily trod down, consumed, and spoiled the said grass and herbage growing in and upon the said closes in which, &c., which are the supposed trespasses whereof the plaintiff hath above complained; and this the defendant is ready to verify.

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2. *Plea, to a Declaration for Hunting, &c. in Plaintiff's Close, justifying by virtue of the Game Act, under a grant from Plaintiff's Landlord of the privilege of Shooting, &c. the Game being reserved to the Landlord.* (*d*)

And for a further plea in this behalf, the defendant saith, that W. H. [*proceed as in the preceding plea to the asterisk*]; and the defendant further saith, that after the passing of a certain Act of Parliament, made and passed in the reign of his late majesty King William the Fourth, in such case made and provided, to wit, at the times when, &c., the defendant having duly obtained and being possessed of and entitled unto an annual game certificate, he the said W. H. being seised of and in the said reversion of and in the said closes in which, &c., and being the landlord of the said closes in which, &c., and being so entitled as aforesaid then authorized the defendant to enter upon the said several closes in which, &c., for the purpose of pursuing and killing, and to pursue and kill game thereon according to the said statute, wherefore the defendant at the several times when, &c., having such certificate and being so authorized as aforesaid, entered the said several closes in which, &c., with dogs and horses, for the purpose of pursuing and killing game thereon, and then and there with the said dogs hunted and †searched for hares and other game in and upon the said closes in which, &c. and killed, seized, took, and carried away the said several hares in the declaration mentioned, from the said closes in which, &c. the same being by the defendant then and there found thereon, and converted and disposed thereof to his, the defendant's, own use, and upon those occasions the defendant with feet in walking and with the said several dogs and

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(*d*) By 1 & 2 Will. 4, c. 32, ss. 30, 31, it is a penal offence to trespass in the daytime upon lands in search of game, punishable by a fine on conviction before a justice of peace; and all such trespassers may be required by the gamekeepers, occupiers, &c. to quit the land and to tell their names and places of abode, and in case of refusal may be arrested. These provisions, however, do not apply to persons hunting or coursing and pursuing game started elsewhere, or claiming or exercising a right of free warren; nor to gamekeepers; nor do they preclude or prevent any person from proceeding by way of action to recover damages for trespasses; except that when proceedings have been taken under the act no action is maintainable for the same trespass. By sections 7, 8, 11, 12, where leases or agreements exist, the landlord has the right of entering on the land himself to kill game, or of authorizing certificated persons to do so, and no lessee has the right, except where it has been expressly allowed by the lease, or where a fine has been taken on the lease, or the lease itself exceeds twenty-one years; provided that nothing in the act is to prejudice rights given or reserved by existing contracts, or the owners of forests, chases or warrens, or the lords of manors; and where the landlord has the right to kill game to the exclusion of the occupier, either by the act or by reservation, he may authorize other certificated persons to do so, and the occupier is liable to a penalty for killing or pursuing game without the landlord's authority.

horses, then and there necessarily trod down and consumed a little of the grass and herbage growing in the closes in which, &c., which are the several supposed trespasses whereof the plaintiff hath above complained; and this the defendant is ready to verify.

## LIBERUM TENEMENTUM.

*Ante*, 755, 756, Forms 3, 4.

## LICENSE.

[See Plea and Replication, &c. *ante*, 726, and note (*d*). Form of plea of license by *deed* to sink pits, &c. and replication; Roberts *v.* Davey, 4 B. & Ad. 664. Plea of license to enter under a power to sell, and a covenant for quiet possession, conferred by plaintiff, the freeholder, on a trustee to secure a debt; Watson *v.* Waltham, 2 Ad. & E. 485; 1 H. & W. 24, S. C.]

## MESNE PROFITS.

[In trespass for *mesne profits*, (see declaration, *ante*, 723, and *id.* notes,) the plea of *not guilty* (as in ordinary cases) merely denies that defendant occupied and kept the plaintiff from possession; see *ante*, 752, note (*t*). In Doe *v.* Huddart, 2 C. M. & R. 316, the defendant pleaded to a declaration in trespass for *mesne profits* in the ordinary form; 1st. as to trespasses on and before a certain day, not guilty; 2dly, that the premises were not the plaintiff's premises, (and see Jefferies *v.* Dyson, 2 Stra. R. 960); 3dly, that the defendant committed the trespasses on and prior to the day named, by the license of plaintiff; 4thly, as to trespasses since that day, payment of money into Court. Upon the second plea, the Court held that defendant might give evidence of title in himself, though he had let judgment go by default in the ejectment; the judgment therein not being *conclusive* evidence of title, as it was not replied by way of *estoppel*.]

## †NEW ASSIGNMENT IN TRESPASS TO REALTY. (*e*)

### 1. *New Assignment extra viam, &c., upon a Plea of Right of Way, &c.*

And the plaintiff, as to the said —— plea, saith that he commenced his

(*e*) In trespass to land, a new assignment, setting out the name or abuttals of the close, in answer to a plea of *liberum tenementum*, was, before the New Rules, in

said action not for the trespasses in the said —— plea mentioned, and

common use; but those rules, by requiring that the *declaration* should describe the *locus in quo*, have rendered a new assignment in this instance, unnecessary; *ante*, 721, note (*g*). A new assignment in trespass to realty is necessary where the plea sets up matter of justification, covering the trespasses to which the plea is pleaded, and the plaintiff cannot deny the *cause* of justification, and either relies on another *distinct* trespass, or upon an *excess* committed by the defendant in exercising his right; see *ante*, 728, 729, note (*i*). Form of new assignment of another distinct trespass; *ante*, 730. In trespass to the *person*, where the plaintiff relies on *excess*, it is usual to reply it; see *ante*, 731; *id.* note (*l*). In trespass to *realty*, where the plaintiff relies on *excess*, it is usually *new assigned* as in the following form Sometimes the plaintiff may deny the justification and also new assign, without committing the fault of duplicity. Thus in trespass to land, laid to have been committed *on divers days*, so that distinct trespasses may have been committed at separate periods, where the defendant pleads a right of way, &c., the plaintiff may traverse the right, and also new assign other trespasses *extra viam*, or on totally different occasions and for other purposes; see 1 Chit. Pl. 5th ed. 665, 6th ed. 630, and *ante*, 730, note (*e*). But, in such cases, on account of *costs*, (see *infra*, note,) it is injudicious for the plaintiff to *traverse* the right set up in the plea, unless there be good reason to dispute it.

Great caution is necessary on the part of the defendant in his treatment of the new assignment. Suppose the defendant has pleaded, 1st, *Not guilty*, or *liberum tenementum*, &c., or both, and 2dly, A special plea of justification, (under a right of way, &c.,) and the plaintiff, 1st, joins issue on the plea of not guilty; 2dly, traverses the right of way, and 3dly, *new assigns*; if the defendant join issue on the right of way and suffer judgment on the new assignment, *without withdrawing the general issue or liberum tenementum*, (or both,) so far as they relate to the trespasses newly assigned, the plaintiff is entitled to the general costs of the cause and trial if he succeed on the new assignment, although the defendant succeed on his special plea. For in such case as the plea of not guilty (or *liberum tenementum*,) is left on the record, the plaintiff is compelled to go to trial to get rid of that plea, which otherwise would have barred his whole action; Broadbent *v.* Shaw, 2 B. & Ad. 840; 1 Dowl. P. C. 336; Hoare *v.* Thames Navigation, 6 Moore, 324; 3 B. & B. 117; Vickers *v.* Gallimore, 5 Bing. 196; 2 M. & P. 359, S. C.; Probert *v.* Phillips, 2 M. & W. 41, per Parke, B.; Forester *v.* Dale, 1 Dowl. P. C. 412; Tidd, 9th ed. 966, 973, 974; Arch. by Chit. 5th ed. 999, 1000; 1 Saund. 300 a, note. The defendant ought therefore in cases of this kind, where there is any doubt whether he will succeed on a plea of not guilty or *liberum tenementum*, &c., pleaded to the declaration, not only to suffer judgment as to the new assignment which he cannot deny, but also to withdraw *such plea*, as to the trespasses newly assigned, (according to Form 4, *post*, 772,) and then the plaintiff, failing on his traverse of the special plea of justification, and having only an assessment of damages on the judgment by default on the new assignment, will not be entitled to the costs of the issue and trial, but only to costs of the judgment by default. *In such case*, as the defendant succeeds on the only *issues joined*, (and the case is the same, *a fortiori*, if he succeed on *all*, if there be several issues joined,) and the plaintiff was not driven to trial to succeed on an issue on which he was entitled to success, but might have avoided traversing the justification and have executed a writ of inquiry on the new assignment, the defendant is entitled to all the costs of the trial; see *id.*; Ruddock *v.* Smith, 1 Dowl. P. C. 467. In Harber *v.* Rand, 9 Price, 336, where in trespass the defendant pleaded a public right of way, and the plaintiff took issue thereon, and new assigned trespasses *extra viam*, upon which the defendant suffered judgment, and at the trial the jury found for the defendant on the right of way, and 1*s.* damages on the new assignment; the Court held the defendant was entitled on the issue found for him to the general costs of the trial, and that the plaintiff was entitled on the new assignment to no more costs than damages.

It is often judicious *to pay money into Court* upon a new assignment; also withdrawing the pleas affecting the trespasses newly assigned. In Griffiths *v.* Jones, 1 M. & W. 731, the defendant pleaded the general issue and justified under a right which the plaintiff traversed. The plaintiff afterwards obtained an order to amend upon payment of costs, and withdrew the traverse and new assigned excess; the defendant confessed the new assignment, *and withdrawing* so much of the general issue as applied to that part of the declaration new assigned, *paid into Court* 10*l.* in satisfaction of damages under the new assignment, which the plaintiff took out. The master allowed the plaintiff the costs of the writ and of the new assignment and subsequent proceedings, but gave the defendant the other costs and the general costs of the cause: held, that the master was right. And Lord Abinger, C. B said

†therein attempted to be justified, but for that the defendant on the said several days and times in the declaration mentioned, with force and arms [* (*f*) in a *greater degree*, and to a *greater extent*, and with *more force and violence* than was necessary for abating and removing the said supposed stoppages and obstructions in the said —— plea mentioned, and opening the said supposed way, committed the said several trespasses in the declaration mentioned, *or* ("in the introductory part of that plea mentioned"); and also, for that the defendant *] on the said several days and times in the declaration mentioned, with force and arms broke and entered the said close in which &c., and with feet in walking [*&c. as in declaration*,] on other and *different occasions*, and for other and different *purposes* than the occasion and purpose in the said —— plea mentioned, and in other and different parts of the said close in which &c., *out of the said supposed way* in that plea mentioned, in manner and form as the plaintiff hath above thereof complained, which trespasses above newly assigned are other trespasses than those in the said —— plea mentioned and attempted to be justified; and this the plaintiff is ready to verify, wherefore he prays judgment and his damages by him sustained on occasion of the committing of the trespasses above newly assigned, to be adjudged to him, &c.

### 2. *Plea to New Assignment.* (*g*)

And the defendant, as to the said supposed trespasses above newly assigned, says that he is not guilty of the same or any part thereof; and of this the defendant puts himself upon the country, &c., [*or if the plea be not in denial only, but in confession and avoidance, after stating the defence, conclude*, "and this the defendant is ready to verify, wherefore he prays judgment if the plaintiff ought to maintain his action thereof against him in respect of the said supposed trespasses above newly assigned."

### 3. *Replication to a Plea to a New Assignment.*

The plaintiff as to the said plea to the said *trespasses* above newly assigned, †says that [*&c. either conclude to the country or with a verification, according to the subject-matter of the reply; the verification is thus:*] And this the plaintiff is ready to verify, wherefore he prays judgment and his damages by him sustained, on occasion of the committing the said trespasses above newly assigned, to be adjudged to him, &c.

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"the point to be considered is, whether the payment of money into Court and the taking of it out by the plaintiff in satisfaction of the damages sustained, is not equivalent to a judgment by default to the new assignment. If so, then the defendant is entitled, as he has succeeded on all except as to the 10*l.*, to the general costs, and the plaintiff to the costs of the writ and the new assignment."

(*f*) Omit the allegation between the asterisks, if the plaintiff merely complain of a trespass *out* of the *way*.

(*g*) As to the impolicy of this plea when not clearly sustainable, see *ante*, 770, note (*e*).

4. *Judgment by default as to the Trespasses newly assigned, relinquishing the Pleas to the Declaration, as they relate to the Trespasses newly assigned.* (*h*)

And the defendant *relinquishing* and withdrawing his said *several pleas* by him above pleaded to the said declaration, so far as the same pleas relate, or either of them or any part thereof relates to the said *trespasses* above newly assigned or any part thereof, says nothing in bar or preclusion of the said action as to the said *trespasses* above newly assigned, wherefore, &c.

## PAYMENT INTO COURT.

[*Ante*, 727, Form 7. Payment into Court upon a new assignment; Griffiths *v.* Jones, 1 M. & W. 731, cited *ante*, 770, note (*e*).]

## PROCESS,—SHERIFF.

1. *To Trespass quære clausum fregit—Pleas justifying under process.*

[See Forms of pleas by judgment creditors, sheriffs, &c. justifying an entry into premises under writs of fieri facias against the goods of the plaintiff, or a third person, 3 Chit. Pl. 5th ed. 1132 to 1134, 6th ed. 1052, 1053. See Forms of justification under process of inferior Courts, Green *v.* Davies, 3 B. & Al. 601; Dyson *v.* Wood, 3 B. & C. 449. When the sheriff, as to the *goods*, should plead not guilty, or deny the plaintiff's property, see *ante*, 699, notes (*z*), (*a*). Where the fi. fa. was against the goods of a third person, but the plaintiff in his declaration claims the goods, and the defendant contends that they were fraudulently assigned to him by the debtor to defeat the execution, the plea should aver that the goods of the debtor, being the goods mentioned in the declaration, were in plaintiff's house, but had been fraudulently conveyed to him (giving *him color*); see Form in trover, *ante*, 700. Plea to a declaration in trespass for taking goods, that the goods were taken in execution by the sheriff under a fieri facias at the suit of the present defendant

(*h*) Form, &c., 1 Wms. Saund. 300, note (*f*). As to the policy and object of this step in reference to costs, see *ante*, 772, note (*e*). But the payment of a sufficient sum of money into Court upon the new assignment, "relinquishing and withdrawing the pleas," &c., as above, and then by judge's order, pleading payment into Court in the common form to the trespasses newly assigned, would seem to be as advantageous for the defendant, in reference to costs, as the suffering judgment as above; see *id.*

against the present plaintiff, and that the execution was set aside by the Court on the terms that the present plaintiff should not bring any action; see Perkins *v.* Plympton, 7 Bing. 676; 5 M. & P. 731, S. C.

2. *Plea to Declaration for entering House and taking Goods, that the Goods therein were the property of Plaintiff and M. G., that defendant recovered a judgment against M. G. justifying the sale of a moiety under a fi. fa. against him.*

And for a further plea in this behalf, the defendant saith, that long before and at the said time when, &c. the plaintiff and one M. G. were jointly possessed of the said goods and chattels in the said declaration mentioned as of their own proper goods and chattels, and the defendant further saith, that heretofore and before the said time when, &c. to wit, on [*&c. here state the recovery of the judgment against M. G., the issuing of the writ of fi. fa. reciting it, stating the indorsement on the writ, and the delivery thereof to the sheriff as ante*, 592.] By virtue of which said writ, the defendant, so being sheriff as aforesaid, afterwards, to wit, at the said time when, &c. entered into the said dwelling-house in which, &c. by the outer door, the said outer door then being open, in order to levy the damages aforesaid of one undivided moiety of the said goods and chattels in the said declaration mentioned, the same goods and chattels then being in the said dwelling-house, and did necessarily seize and take and carry away the said goods and chattels (*i*) for the purpose aforesaid, as it was lawful for the defendant to do, and then sold the said moiety (*i*) belonging to the said M. G. of the said goods and chattels in satisfaction of the said damages, which are the supposed trespasses in the said declaration mentioned; and this the defendant is ready to verify.

3. *Replication to a Plea of Justification under a Fieri Facias.*

[*De injuriâ* generally, is not a good replication to a plea of justification under process, and the plaintiff should specifically deny the judgment, writ or warrant, according to the facts; or admitting them, reply *de injuria* as to the *residue;* see *ante*, 728, 729, note (*e*). Where there has been *excess*, &c. it should be replied or new assigned, *id. ante*, 730 and 728, note. Where in trespass for breaking and entering plaintiff's ship and seizing and converting his goods, the defendants justified under a fieri facias, to which plaintiff replied *de injuria absque residuo causæ*, and new assigned that defendants entered the ship and took the goods for

(*i*) In an execution against one of two joint tenants, sheriff should *seize* the whole of the property which is the subject of the joint tenancy, but *sell* only defendant's moiety undivided; 1 Salk. 392; 1 Show. 169; Comb. 217; Cowp. 449; Eddie *v.* Davidson, 2 Doug. 650; Morley *v.* Strombom, 3 B. & P. 254, 288; Tidd, 9th ed. 1007; Arch. by Chit. 5th ed. 486.

other purposes than those mentioned in the plea; it was held, that the *virtute cujus* was put in issue, and that it was competent to the judge to leave it to the jury to say whether the goods were *bona fide* taken under the writ, or whether the execution was resorted to as a color for taking them, to evade payment of freight, to which they would have been liable, had defendants accepted them under the bill of lading, and not to effect a sale by virtue of the writ; Lucas *v.* Nockels, 4 Bing. 729; 1 M. & P. 803, affirmed in error; 1 M. & P. 783; 2 Y. & J. 304; 10 B. & C. 157; 1 C. & M. 500; 1 Clark & Fin. 438, S. C.: recognized in Ransford *v.* Copeland, 1 N. & P. 671. *Semble, de injuria* does not in general put in issue defendant's *motive;* 2 M. & W. 798. The allegation in the plea that the "outer door was open," is put in issue by *de injuria;* see Kerby *v.* Denby, 1 M. & W. 336. Where the fieri facias is against the goods of a third person and the defendants entered plaintiff's house, a replication "that the goods were and each of them was the goods of the plaintiff," denying that the judgment debtor had any goods in plaintiff's house, would be a good answer to the plea, but would admit the judgment and execution; see Jones *v.* Brown, 1 Bing. N. C. 489, per Tindal, C. J. Form of replication that a writ of error was allowed before the fieri facias; Belshaw *v.* Marshall, 4 B. & Ad. 336; 3 Chit. Pl. 5th ed. 1207, 6th ed. 1132.]

## WAYS.

1. *Plea of a Private Right of Way by virtue of Twenty Years enjoyment by the Occupiers of Defendant's Land, under the Prescription Act, 2 & 3 W. 4, c. 71. (j)*

And for a further plea in this behalf (*k*) the defendant saith, that for

(*j*) See declaration, &c. in *Case* for disturbing a right of way, and notes, *ante*, 611. The late Prescription Act, 2 & 3 W. 4, c. 71, has effected great improvement in the law relative to *Easements* claimed by *prescription*, as well by defining and regulating the right, and the evidence to be adduced in support of, or in opposition to the claim, as by simplifying the mode of stating it in pleading. Before the act a claim by prescription to a right of way or common, or other easement or profit, to be enjoyed or taken in the soil of another, could not be established without showing that it existed from time immemorial, or in pleading language, "from time whereof the memory of man runneth not to the contrary," (being in legal contemplation, the whole period of time from the reign of king Richard the First,—see the recital in the act.) It is true that the Courts held that proof of twenty years' adverse user or enjoyment of the easement furnished a *presumption* that the right had existed from time immemorial. Still this presumption was subject to be rebutted by evidence that at any one given period of time since the commencement of legal memory, the right had become extinguished, as by unity of seisin of the several properties in the same person, and thus the *continuity* of enjoyment *from* time immemorial had been destroyed. The plea justifying immemorial user, (see forms, 3 Chit. Pl. 5th ed. 1118 a, 6th ed. 1034,) was, upon a traverse thereof, always open to defeat at the trial, by this proof. In order to obviate the difficulty, it became the practice to plead a right of way by what was termed a "*non-existing grant*," (see Forms, 3 Chit. Pl. 5th ed. 1122, 6th ed. 1041; Blewitt *v.* Tregonning, 3 Ad. & E. 554,) that is, a *feigned* grant by deed, (supposed to be lost) from a former freeholder of the land in or upon which the

the full period of twenty (*l*) years *next* (*m*) before the commencement of this †suit, (*n*) the respective occupiers for the time being of a certain

easement was exercisable, to a former freeholder the tenements in respect of which it was claimed. It was however necessary to name these parties in the plea; see Hendy *v.* Stephenson, 10 East, 55. And, although the plea could not be defeated by evidence of the nature alluded to, yet it required proof, if denied, that at the anterior period stated, the parties described as the former freeholders (the pretended grantor and grantee of the easement) really were such freeholders concurrently of the respective properties; see Blewitt *v.* Tregonning, 3 Ad & E. 554. This was often a matter difficult to be ascertained and proved; and the plea therefore often failed, see *id.*, although the Courts allowed the grant to be *presumed*, where evidence of the respective parties being seized was adduced, and there was evidence of adverse enjoyment for a long period of years. Again, it was necessary in a plea of justification under a prescriptive right of way, &c., to prescribe in a *que* estate, that is in right of the owner of the *fee* "and those whose estate he had," and then to justify as servant of such freeholder, or deduce a possessory title from him to the defendant. This often raised objections and difficulties foreign to the merits of the question of easement.

The statute removes all these difficulties, 1st, by providing that mere proof of enjoyment for a certain term of years, uninterruptedly, and under a claim of right, shall not only be deemed presumptive evidence of the right, but shall not be defeated merely by showing that the right or benefit was first enjoyed at any time prior to such term of years, and within legal memory; and in some cases making the right, after a prescribed period of user, absolute and indefeasible; and 2dly, by providing a general form of plea claiming the easement merely by virtue of a certain term of enjoyment as of right, &c.

The 1st section relates to *Commons* and other profits *a prendre*; *ante*, 509, note (*p*): the 2d, to rights of *Way* and other easements, and Watercourses; *ante*, 601, note (*m*): and the 3d to claims to the use of Light; *ante*, 497, note (*b*). The 4th section provides that the period of enjoyment mentioned shall be deemed to be those *next before suits* or actions, wherein the claim to which such periods relate shall have been brought into question; and no matter shall be deemed an interruption unless acquiesced in for a year, &c.; see *ante*, 498, note (*b*). The 5th section, after sanctioning the old practice of claiming easements *generally*, in *declarations* in case for obstructing the exercise thereof, (*ante*, 498, note (*b*),) provides that "in all pleadings to actions of *trespass*, and in all *other pleadings*, wherein, before the passing of this act, it would have been necessary to allege the right to have existed *from time immemorial*, it shall be sufficient to allege the enjoyment thereof *as of right, by the occupiers of the tenements*, in respect whereof the same is claimed, for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee as is now usually done; and if the other party shall intend to rely on any *proviso*, *exception*, *incapacity*, *disability*, *contract*, *agreement*, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law *not inconsistent with the simple fact of enjoyment*, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation." The 6th section enacts, "that, in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favor or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act, as may be applicable to the case and to the nature of the claim." The 7th section provides also, "that the time during which any *person otherwise capable of resisting any claim to any of the matters* before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be *excluded* in the computation of the periods hereinbefore mentioned, *except only* in cases where the right or claim is hereby declared to be absolute and indefeasible. By section 8, provided always, "that when any land or water, upon, over, or from which any such *Way* or other convenient *Watercourse* or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof."

close called ["The Grange," *or* "a certain messuage," &c. *as the case may be,*] situate in †the parish aforesaid, in the county aforesaid, ["and

"In order to establish a right of way, and to bring the case within the 2nd section, it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so 'as of right,' for that is the form in which by section 5 such a claim must be pleaded, and the like evidence would have been required before the statute to prove a claim by prescription or non-existing *grant*. Therefore if the way shall appear to have been enjoyed by the claimant, not openly and in the manner a person rightfully entitled would have used it, but by stealth as a trespasser would have done,—if he should have occasionally asked the permission of the occupier of the land,—no title would be acquired, because it was not enjoyed 'as of right.' For the same reason it would not, if there had been *unity of possession* during all or part of the time, for then the claimant would not have enjoyed 'as of right' the easement, but the soil itself. So it must have been enjoyed *without interruption*. Again, such claim may be defeated in any other way by which the same is now liable to be defeated, that is, by the same means by which a similar claim arising by custom, prescription or grant would now be defeasible; and therefore it may be answered by proof of a grant, or of a license, written or parol, for a limited period comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents during the whole time that it was exercised. So far the construction of the act is clear, and this enjoyment of twenty years having been uninterrupted and not defeated on any ground above mentioned, would give a good title."—Per Parke, B. in delivering the judgment of the Court in Bright *v.* Walker, 1 C. M. & R. 211; 4 Tyr. 502.

This exposition of the statute was recognized in the subsequent case of Monmouth Canal Company *v.* Harford, 1 C. M. & R. 614; 5 Tyr. 163, S. C., in which it was held that on a *replication taking issue* on the twenty years' enjoyment, the defendant is bound, in support of his plea, to show an uninterrupted enjoyment as of right during that period, and that the plaintiff may prove *under that issue* applications by the defendant during the twenty years to use the way, and that it was not necessary to reply such license specially under section 8. And Lord Lyndhurst, C. B. said, "The simple issue is whether there has been a *continued* enjoyment of the way for twenty years, and any evidence negativing the continuance is admissible. Every time that the occupiers asked for *leave*, they admitted that the former license had expired and that the *continuance* of the enjoyment was broken." The case of Tickle *v.* Brown, 4 Ad. & E. 369, also decides that the meaning of the words "claiming right" and "enjoyment as of right," used in the 2d and 5th sections of the act, is, an enjoyment had not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion or on many; but an enjoyment had openly, notoriously, without particular leave at the time by a person claiming to use, without danger of being treated as a trespasser, as a matter of right, whether the right so claimed shall be strictly legal, as by prescription, &c., adverse user, or by deed, or shall have been merely lawful so far as to excuse a trespass. And it was held that to a plea of forty or twenty years' enjoyment of a way, a license, if it covered the *whole* time, must be pleaded; but that a parol or other license given or acted upon *during* the forty or twenty years may be proved under a *general traverse as of right*, and this whether such license be granted for a single time of using or for a definite period.

The distinction is, that license asked from time to time, within the twenty or forty years, breaks the *continuity* of enjoyment *as of right*, and may therefore be shown (under the general traverse to negative the enjoyment rendered necessary by the statute,) as matter which is "inconsistent with the simple fact of enjoyment during the forty or twenty years." This doctrine was confirmed in the subsequent case of Beasley *v.* Clarke, 2 Bing. N. C. 705; 3 Scott, 258; 2 Hodg. 100, S. C. In trespass there was a plea of way, used by the occupiers of defendant's farm as of right and without interruption. The replication traversed the way as of right. Held, under this issue, plaintiff might prove that the way had been used by leave and license only.

In the above-mentioned case of Bright *v.* Walker, another important point upon the construction of the prescription act was determined, viz., the extent to which an adverse user of a right of way will bind the lessee and the *reversioner* of the land over which the way passes. In that case a way had been used adversely for twenty years over land in the possession of a lessee, who held a lease for lives granted by the bishop of Worcester, and it was held that this user gave no right as against the bishop and did not affect the See. It was likewise held that no right was gained as against the bishop's *lessee*. The grounds of this decision are fully explained by Parke, B. in delivering the judgment of the Court, and are a valuable commentary on the

adjoining the said close in which he," *if the fact be clearly so,*] actually had used and enjoyed, and †were respectively accustomed to use and en-

statute.—"If the enjoyment," he observes, "take place with the acquiescence or by the laches of one who is tenant for life only, the question is, what is its effect according to the true meaning of the statute 2 & 3 Will. 4? Will it be good to give a right against the See and those claiming under it by a new lease, or only against the termor and his assigns during the continuance of the term or will it be altogether invalid? In the first place it is quite clear that no right is gained against the bishop; whatever construction is put on the 7th section, it admits of no doubt under the 8th. It is quite certain that an enjoyment of forty years instead of twenty, under the circumstances of this case would have given no title against the bishop, as he might dispute the right at any time within three years after the expiration of the lease, and if the lease for life be excluded from the longer period as against the bishop, it certainly must from the shorter. Therefore there is no doubt but that this possession of twenty years, gives no title as against the bishop, and cannot affect the right of the See. The important question is, whether this enjoyment, as it cannot give a title against all persons having estates in the *locus in quo*, gives a title as against the lessee and the defendants claiming under him, or not at all? We have had considerable difficulty in coming to a conclusion on this point; but upon the fullest consideration, we think that no title at all is gained by an user which does not give a valid title *against all, and permanently affect* the See. Before the statute, this possession would indeed have been evidence to support a plea or claim by non-existing grant from the termor in the *locus in quo*, to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence, and in practice the usual course was to state a grant by an owner in fee to an owner in fee. But since the statute such a qualified right we think is not given by an enjoyment for twenty years. For, in the first place, the statute is for shortening the time of prescription, and if the periods mentioned in it are to be deemed new time of prescription, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the land in fee. And in the next place the statute no where contains any intimation that there may be different classes of rights, qualified and absolute, valid as to some persons, and invalid as to others. From hence we are led to conclude that an enjoyment of 20 years, if it give not a good title against all, gives no good title at all, and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and therefore is not good against every one, it is not good as against any one, and therefore not against the defendant. This view of the case derives confirmation from the 7th section, which, it is to be observed, excludes in express terms the time that the person who is capaple of resisting the claim to the way is tenant for life, and unless the context makes it necessary for us, in order to avoid some manifest incongruity or absurdity, to put a different construction, we ought to construe the words in their ordinary sense. This construction does not appear to us to be at variance with any other part of the act, nor to lead to any absurdity. During the period of a tenancy for life, the exercise of an easement will not affect the fee. In order to do that there must be that period of enjoyment against an owner of the fee. The conclusion therefore to which we have arrived is, that the statute gives no right from the enjoyment that has taken place; and as section 6 forbids a presumption in favor of a claim to be drawn from a less period of enjoyment than that prescribed by the statute, and as more than twenty years is required in this case to give a right, the jury could not have been directed to presume a grant by one of the termors to the other by the proof of possession alone. Of course nothing that has been said by the Court, and certainly nothing in the statute, will prevent the operation of an *actual grant* by one lessee to the other, proved by the deed itself, or upon proof of its loss by secondary evidence, nor prevent the jury from taking the possession into consideration with other circumstances as evidence of a grant, which they may still find to have been made if they are satisfied that it was made in point of fact."

Upon the plain wording or the 4th section, that the periods of twenty years, &c. as the case may be, shall be deemed and taken to be next before the commencement of some suit," bringing the claim in question; the Court held in Wright v. Williams, (1 Tyr & G. 375; 1 M. & W. 77,) that it is sufficient to allege in the plea and prove an user of twenty or forty years before the *commencement of the suit*, and it need not be alleged to have been for that term before the trespasses were committed. The statute legalizes therefore by relation back all acts within the prescribed period, if such period elapsed before *suit*, although at the time they were committed they were

joy, *as of right* (*o*) *and without interruption*, a certain way for themselves and their servants to go, return, †pass and repass on foot, and with horses and other cattle, and with waggons and other carriages (*p*) from (*q*) the said close called [" The Grange,"] towards, unto, (*r*) into, through, over and along the said close in which, &c., and from thence unto and into a certain common king's highway in the county aforesaid, and so from thence back again from the said king's highway, towards and unto and into and through the said close in which, &c. unto and into the said close called [" The Grange,"] at all times of the year, (*s*) at his and their

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trespasses, and might be so treated if when the action was brought there had not been an enjoyment for the requisite term.

Upon a plea of forty years' enjoyment of a way, evidence may be given of user *more* than forty years back, as some evidence as to the state of things at the distance of forty years; and it was observed by Littledale, J. " if evidence of user beyond forty years were to be excluded, it might be that after the case had been established as far as thirty-eight years back, a discontinuance of proof might occur as to the two or three preceding years, and the party might fail, because he was unable to carry his case on without going to the distance of forty-one; Lawson *v.* Langley, 4 Ad. & E. 890. Nor need the plea state twenty (or forty) years " *next*" before the commencement of the suit; Jones *v.* Price, 3 Scott, 376; 3 Bing. N. C. 52.

The defendant succeeding on a plea of right of way pleaded to the whole declaration, is entitled to the postea and general costs, as having substantially succeeded, although the plaintiff succeed on plea of not guilty, and a plea denying the close was the plaintiff's; Staley *v.* Long, 3 Bing. N. C. 781.

(*k*) If all the trespasses charged in the declaration are not justified, confine the plea to the residue.

(*l*) Add a plea claiming by virtue of 40 years' enjoyment, if the facts warrant such a plea

(*m*) The word " next" is not essential here; Jones *v.* Price, 3 Bing. N. C. 52; 3 Scott, 376, S. C.

(*n*) It is sufficient to allege an user for twenty years before the commencement of the suit, and it need not be alleged to have been for twenty years before the trespasses complained of; Wright *v.* Williams, 1 Tyr. & G. 375; 1 M. & W. 77, S C.

(*o*) Sometimes the form is "*claiming right thereto*;" and see Jones *v.* Price, 3 Bing N. C. 52; Jones *v.* Richard, 5 Ad. & E. 15.

(*p*) Evidence of enjoyment with all manner of carriages does not necessarily prove a right of way for all manner of cattle; but it is evidence of a drift way, for the jury to consider together with the other evidence: for the extent of the usage is evidence of a right only commensurate with the user; Bullard *v.* Dyson, 1 Taunt. 279.

(*q*) The distinction is between a *public* and *private* way. The termini of the former need not be stated; *aliter* in the case of *private* ways; Com. Dig. Chimin, D. 2; Bac. Ab. Highways, C. But it is not necessary to describe all the closes intervening between the two termini. Therefore where the claim was in the form in the text, and it appeared that the way was from plaintiff's close over *land of third persons* and *thence* into the defendant's close, &c. it was held that the plea was sufficiently proved; Simpson *v.* Lewthwaite, 3 B. & Ad. 226.

(*r*) There is no rule which lays down that because a road forms an acute angle in order to reach a terminus, it does not lead " towards and unto" the terminus; Rex *v.* Marchioness of Downshire, 4 Ad. & E. 232, 240.

(*s*) If the user and right be limited to particular periods or purposes, the plea must state the fact accordingly. A right of way for agricultural purposes is a limited and qualified right of way, and does not necessarily confer a right to use such way for general and universal purposes; Jackson *v.* Stacey, Holt, N. P. R. 455. Right of way for rector to carry away tithes; James *v.* Dods, 4 Tyr. 201; 2 C. & M. 266; 3 Chit. Pl. 5th ed. 1128, 6th ed. 1047. Right of way to carry minerals; Monmouthshire Canal Company *v.* Harford, 1 C. M. & R. 614; 5 Tyr. 72.

By the New Rules, tit. Trespass:—

" 4. Where in an action of trespass *quare clausum fregit* the defendant pleads a right of *way* with carriages and cattle on foot in the same plea, and issue is taken thereon, the plea shall be taken distributively, and if the right of way with cattle or on foot only shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified."

" 6. And *in all actions* in which such right of way or common as aforesaid, *or*

free will and pleasure as to the said close called ["The Grange"] belonging and appertaining; and the defendant saith, that during part of the said period of twenty years, to wit, at the said several times when, &c. he was the occupier of the said close called ["The Grange"]; and the defendant being such occupier, and having occasion and being so entitled to use the said way, †did at the said times when, &c. with his servants and with his horses and other cattle, and his waggons and other carriages, pass and repass, in, by, through and along the said way from the said close called ["The Grange,"] into, through, over and along the said close in which, &c. towards and unto and into the said highway, and so from thence back again, in, by, through and along the said way unto and into the said close called ["The Grange,"] (*t*) using the said way there for the purpose, and upon the occasion aforesaid, as he lawfully might for the cause aforesaid; and in so doing (*u*) the said defendant, at the said times when &c. with feet in walking, and with the feet of the said horses and other cattle, and the wheels of the said waggons and other carriages, unavoidably trod down, trampled upon, consumed and spoiled a little of the grass and herbage then growing and being in the said close in which &c. and subverted, damaged and spoiled the earth and soil of the same close, and the said cattle at the said several times when &c. in passing and repassing along the said way, by stealth and morsels, and against the will of the said defendant, eat up and depastured a little of the grass and herbage then growing in the said way in the said close in which &c.: and because the said fences, gates, stakes and posts in the declaration mentioned before the said several times when &c. had been wrongfully put and erected, and were then standing in and across the said way and obstructing the same, so that without digging up, pulling up, breaking down, throwing down, prostrating and destroying the said fences, gates, stakes and posts respectively, the said defendant could not then pass and repass with the said cattle and carriages into and along the said close in which &c. in the said way there as he ought to have done, the said defendant at the said several times when &c. in order to remove the said obstructions, dug up, pulled up, broke down, threw down, prostrated and destroyed the said fences, gates, stakes and posts in the said declaration mentioned, and took and carried the said fences, gates, stakes, and posts to a small and convenient distance, and there left the same for

*other similar right* is so pleaded, that the allegations as to the extent of the right are capable of being construed *distributively*, they shall be taken distributively."

And the Rules prescribe "that pleas of a right of way over the *locus in quo*, varying the *termini* or the *purposes*, are not to be allowed." Upon a plea of right of way to fetch water and goods from a river, the jury having found the right to fetch water and negatived the right to fetch goods, the Court ordered judgment to be entered for defendant as to the right to fetch water, and for the plaintiff as to the right to fetch goods; Knight *v.* Woore, 3 Scott, 326; 3 Bing. N. C. 2; Phythian *v.* White, 1 M. & W. 216.

(*t*) Cannot go upon the defendant's land out of the way because the way is impassable; Bullard *v.* Harrison, 4 M. & Sel. 387; Taylor *v.* Whitehead, 2 Dougl. 475; *aliter*, in the case of a *public* way.

(*u*) Of course the following allegations will depend upon the form of the declaration.

the use of the plaintiff, doing no unnecessary damage to the plaintiff on those occasions which are the same supposed trespasses whereof the plaintiff hath above complained against the defendant; and this he is ready to verify.

2. *Replication to the above Plea; denying that the occupiers of Defendant's Land had for Twenty Years used the Way as alleged.* (*v*)

And as to the said —— plea the plaintiff saith, that for the full period of twenty years next before the commencement of this suit, the respective occupiers †for the time being of the said close called ["The Grange"] did not actually have, use, or enjoy, nor were they respectively accustomed to use or enjoy as of right and without interruption the said supposed way for themselves and their servants to go, return, [*&c. traversing the right of way as laid, ending with the words* "as to the said close belonging and appertaining"] in manner and form as the defendant hath in the said —— plea alleged; and this the plaintiff prays may be inquired of by the country, &c.

3. *Replication (to a Plea of forty years' enjoyment of a Way by Occupiers of Defendant's Land) that the user did not affect the Plaintiff, he being Tenant for life.*

[See Form, &c. Wright *v.* Williams, 1 M. & W. 77; 1 Tyr. & G. 375, S. C. It was there held that a replication of a life estate under 2 & 3 W. 4, c. 76, must show that the plaintiff is the person entitled to the reversion expectant on the determination of the life estate.]

4. *Plea of a Right of Way by an existing Grant, &c.*

[There is nothing in the prescription act to interfere with a claim of a right of way by express *grant;* see *ante*, 777, note (*k*), per Parke, B. See the authorities collected in Harrison Ind. tit. Way, XII. 1; 3 Chit. Pl. 5th ed. 1122, note (*a*), 6th ed. 1041, note (*r*); Livett *v.* Wilson, 3 Bing. 115; Plant *v.* James, 2 N. & M. 517; 4 Ad. & E. 749, 765, S. C.; Blewitt *v.* Tregonning, 3 Ad. & E. 554; and Forms, *id.* Right of way

(*v*) The plaintiff may deny that defendant was the *occupier* of the close in respect of which the way was claimed at the times the trespasses were committed, *or* may traverse as above the right of way. The principle and decisions upon the statute 2 & 3 W. 4, in regard to the effect and operation of the general denial of the right of way are noticed, *ante*, 774, note (*k*). As to replying *specially* the *exceptions* in the statute, see *id.*; Wright *v.* Williams, 1 M. & W. 77; 1 Tyr. & G. 375, S. C. According to the cases it is rarely necessary to reply specially. *De injuria generally*, cannot be replied; *ante*, 728, n. (*e*); *ante*, 40, Form 3. Where there is an undoubted right of way, but the defendant has deviated from the track, or been guilty of excess, the plaintiff should *new assign*, as *ante*, 770, Form 1; see *id.* note, as to *replying excess*.

under a local act and award; 3 Chit. Pl. 5th ed. 1127; 6th ed. 1044. Same form, Logan *v.* Burton, 5 B. & C. 513; 8 D. & R. 299, S. C.; Bassett *v.* Mitchell, 2 B. & Ad. 99.]

### 5. *Right of Way of Necessity.*

[See Forms, &c. 3 Chit. Pl. 5th ed. 1125, 6th ed. 1043; Harr. Ind. Way, XII. 3, and Forms in cases there cited.]

### 6. *New Assignment extra viam.*

[See Form, &c. *ante*, 770, and notes.]

### †7. *Plea of Justification under a public Right of Way.*

And for a further plea in this behalf, the defendant saith, that before and at the said times, when &c. there was and of right ought to have been a certain common and public highway (*x*), into, through, over and along the said close in which, &c. for all the liege subjects of our lady the queen to go, return, pass and repass on foot and *with horses and other cattle and carriages*, at all times of the year, at their free will and pleasure, wherefore the defendant, being a liege subject of our lady the queen and having occasion to use the said way, did at the said times, when, &c. with his horses, [*&c. proceed as in* Form 1, *ante*, 779.

(*x*) See notes, *ante*, 778.

# EJECTMENT—DECLARATIONS IN. (a)

## 1. *Declaration in Q. B. [by original] or in C. P.*

In the Queen's Bench, [*or* "Common Pleas."]
[Hilary] Term, in the —— year of the reign of Queen Victoria. (b)

(a) The action of ejectment is a mixed action, for the recovery of the possession of real property, with damages for withholding it. The property itself is recovered in this form of action if the claimant establish his title, but the damages are nominal (except in particular cases by statute between landlord and tenant) and usually form the subject of a subsequent action of trespass for mesne profits; see in general, 3 Bla. Com. 199; Ad. Ej. 1; Tidd, 9th ed. 1189; *id.* N. P. 622; 1 Chit. Pl. 6th ed. 187; Selw. N. P. tit. Ejectment; Harr. Ind. tit. Ejectment. It is a fictitious proceeding, invented for the purpose of avoiding the difficulties and nicieties attending *real* actions. The nature of the action is perspicuously explained in Adams on Ejectment, 15, &c.

A., the person claiming title, delivers to B., the person in possession, a declaration in ejectment, in which John Doe and Richard Roe, two fictitious persons, are made respectively plaintiff and defendant, and in which John Doe states a fictitious demise of the lands in question from A. (*the real claimant*) to himself, for a term of years, upon which John Doe entered, and complains of an ouster from them by Richard Roe during its continuance. To this declaration is annexed a notice, supposed to be written and signed by Richard Roe, informing B. (*the tenant*) of the proceedings, and advising him to apply to the Court for permission to be made defendant in his place, as he, having no title, shall leave the suit undefended. Upon the receipt of this declaration, if B. do not apply within a limited time to be made defendant, he is supposed to have no title to the premises; and upon an affidavit that a declaration has been regularly served upon him, the Court will order judgment to be entered against Richard Roe, the casual ejector, and possession of the lands will be given to A. the party claiming title. When however B. applies pursuant to the notice to defend the action, the Courts annex certain conditions to the privilege. Four things are necessary to enable a person to support an ejectment, namely, *title, lease, entry* and *ouster;* and as the three latter are only feigned in the modern practice, John Doe, the nominal plaintiff, would be nonsuited at the trial if he were obliged to prove them. The Courts therefore compel B., if made defendant, to enter into a rule, generally termed the *consent rule*, by which he undertakes that at the trial he will confess the lease, entry and ouster to have been regularly made, and rely solely upon the merits of his title; and, lest at the trial he should break this engagement, another condition is also added, that in such case he shall pay the costs of the suit, and shall allow judgment to be entered against Richard Roe, the casual ejector. These conditions being complied with, the declaration is altered by making B. the defendant instead of Richard Roe, and the cause proceeds to trial in the same manner as in other actions. The action is commenced by the delivery of the declaration to the tenant in possession, and there is no writ. The action is not within the provisions of the Uniformity of Process Act, or the New Rules on Pleading. Within what time the action should be commenced, see Tidd, N. P. 622; 3 & 4 W. 4, c. 27, s. 2; Ad. Ej. 3d ed. 45, &c. To maintain this action the lessor of the plaintiff must be shown to have, on the day of demise laid in the declaration, a strictly *legal* title and possessory right; see *id.* ch. 3; 1 Chit. Pl. 5th ed. 218; 6th ed. 189.

The following *alphabetical list of particular persons* competent (except where the contrary is stated) to maintain ejectment may be found useful. It is chiefly framed from Mr. Serjt. Adams' excellent work on this action (59 to 92, 3d ed.):—

*Administrators* for leasehold property, Ad. Ej. 70, 71. And the day of demise may be laid after the death and before ad-

—— *Venue local. (c)*] to wit, Richard Roe was summoned to answer †John

ministration granted; 2 Selw. N. P. 8th ed. 719.

*Adverse possession* for twenty years, party having; Ad. Ej. 77; see *id.* 46; 3 & 4 W. 4, c. 27; Tidd, N. P. 622. Even against true owner who ejects; Doe *v.* Reade, 8 East, 358. Indeed mere possession suffices against a wrong-doer; therefore if A. be in quiet possession without title, and B., having no title, enter upon him, A. may maintain ejectment against B.; see Doe *v.* Dyball, M. & M. 346; 1 Chit. Pl. 6th ed. 189; 2 Saund. 111; 4 Taunt. 548, note (*a*).

*Assignees of a Bankrupt*, Ad. Ej. 67; see Arch. Bk. L. 6th ed. 153, 157. Lay day of demise after the appointment of the assignees; 1 & 2 W. 4, c. 56, s. 26.

*Assignees of Insolvent Debtor*, Ad. Ej. 67.

*Assignee of the Reversion*, upon right of re-entry for condition broken, or forfeiture; Ad. Ej. 72.

*Cestui que trust* cannot, where legal title in trustee; Ad. Ej. 32, 33, 82, 88, 211.

*Churchwardens and Overseers* of the poor, for parish lands, &c.; Ad. Ej. 79; see Doe d. Hiley *v.* Jackson, 10 B. & C. 885; Doe d. Llandesilio *v.* Roe, 4 Dowl. P. C. 222, as to mode of laying the demises. Doe *v.* Cockell, 6 C. & P. 525.

*Coparceners*, against each other on an *actual* ouster; and against others on joint, or, it seems, separate demises; Ad. Ej. 91, 54, 209; when not, 5 Ad. & E. 277.

*Copyholder* or his lessee; Ad. Ej. 63, 65. Heir may, without admittance, except against lord: Surrenderee only on admittance (before trial); but then may (except against lord) lay demise after surrender and before admittance; id. and 213, 309; see 3 Bing. N. C. 922.

*Corporations*, Ad. Ej. 78; demise by; id. 215, 217.

*Devisee* may, without entry; but if premises not freehold must have executor's assent; Ad. Ej. 71. Devisee of Copyhold, 5 Ad. & E. 321.

*Dower*. Ejectment lies not for dower before assignment; Ad. Ej. 66; Doe *v.* Nutt, 2 C. & P. 430.

*Elegit*, tenant by; Ad. Ej. 60, 109; Tidd, 9th ed. 1037, 1190.

*Executors*, Ad. Ej. 69; must prove will, but may lay demise before probate granted; Roe *v.* Summerset, 2 Bla. R. 694.

*Guardian* in socage, or testamentary guardian, but not guardian for nurture; Ad. Ej. 66.

*Heir*, unless outstanding term in trustees; Ad. Ej. 32, 33, 53; see also "Copyholder." Demise by heir may be laid on day of ancestor's death; id. 212.

*Husband and Wife* may in ejectment join in demise for wife's land; 1 Chit. Pl. 6th ed. 74, 75.

*Infant*, Ad. Ej. 67. 218.

*Joint Tenant*, against each other if *actual* ouster; against others on joint, or it seems, separate demises; Ad. Ej. 54, 91, 209.

*Landlord*, on power of re-entry for condition, &c. broken; tenancy ended; or on notice to quit; see Ad. Ej. 72, 189, 311, 312, 316. Day of demise to be laid after right of entry accrued.

*Lessee for years*, Ad. Ej. 59, 60.

*Legatee*, after assent by executor, if premises leasehold; Ad. Ej. 71; Doe *v.* Guy, 3 East, 120.

*Lunatic*, Ad. Ej. 91.

*Manor, Lord of*, against copyholder, &c.; Ad. Ej. 61, 307, 308.

*Mortgagees* may (after forfeiture) maintain ejectment against mortgagor, or such of his lessees or tenants who became so after the mortgage, without any notice or demand of possession; but tenants of the mortgagor, who became so after the mortgage, or prior tenants, whose tenancies have been recognized by attornment or receipt of rent, as such, are entitled to formal notice to quit before ejectment by mortgagee; Ad. Ej. 60, 108. See the late cases, 4 B. & Ad. 299; 2 Bing. N. C. 538; 1 N. & P. 650, as to the relative position and rights of the mortgagee and tenants. Within what time a mortgagee must bring ejectment, see 7 W. 4 and 1 Vic. c. 28; 5 Ad. & E. 291.

*Rectors*, Ad. Ej. 80, 302; see "Tithes."

*Rent charge*, grantee of; Ad. Ej. 71. When demand unnecessary; Doe *v.* Horeley, 3 N. & M. 567.

*Tenants in Common*, against each other, if *actual* ouster; against others on *separate*, not joint, demises; Ad. Ej. 91, 210. Amendment at trial, where demise joint, refused; Doe d. Poole *v.* Errington, 1 Ad. & E. 750. On a count on a demise of a whole house, &c. an undivided moiety may be recovered; id. 210, 211.

*Tithes*, rector or vicar entitled to, against persons claiming title thereto, Ad. Ej. 80; see id. 18, 29, 217, 224, 302.

*Trustees* having the *legal* title; Ad. Ej. 33, 81, 211.

*Widow* for free bench, but not for dower until after assignment; Ad. Ej. 65, 66.

(*b*) A declaration in ejectment is to be entitled (and to commence and conclude) according to the old form, that is of the term in which it is delivered, or (if delivered in the vacation), of the preceding term; because an action of ejectment is not within the Rules on Pleading of Hilary term 1834; Doe d. Gillett *v.* Roe, 1 C. M. & R. 19; 2 Dowl. P. C. 690, S. C. But it may be entitled of a particular day out of term; Doe d. Ashman *v.* Roe, 1 Bing. N. C. 253; 1 Scott, 166, S. C.; Doe d. Fry *v.* Roe, 3 M. & Sc. 370. And it seems that it is not material, if there be no

Doe of a plea of trespass and ejectment (*d*) &c., and thereupon the said John Doe, by —— his attorney, complains against the said Richard Roe, †that whereas one [—— (*e*)] heretofore, to wit, on the (*f*) —— day of —— in the year of our Lord ——, in the parish of —— in the county aforesaid, had demised unto the said John Doe —— messuages, (*g*) —— cottages, —— barns, —— stables, —— coachhouses, —— outhouses, —— yards, —— gardens, —— orchards, —— acres of arable land, —— acres of meadow land, —— acres of pasture land, —— acres of woodland, —— acres of land covered with water, and —— acres of other land, with the appurtenances, situate and being in the said parish of —— in the county aforesaid, to have and to hold the same to the said John Doe and his assigns thenceforth for the term of fourteen years [*a sufficient number of years to extend beyond the time within which judgment can be obtained,*] thence next ensuing and fully to be complete and ended; * by virtue of which said demise, the said John Doe entered into the said tenements with the appurtenances, and became and was possessed thereof for the said term so to him thereof granted; and the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the day and year aforesaid, with force and arms entered into the said tenements with the appurtenances in which the said John Doe was so interested in manner and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm, and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe and against the peace of our lady the queen; wherefore the said John Doe saith he is injured and hath sustained damage to the value of £100, and therefore he brings his suit, &c. [*Add the following notice.*]

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title of the term, &c. or a wrong one, if the tenant has sufficient notice when to appear; Ad. Ej. 3d ed. 207; Tidd, N. P. 625; 2 Ad. & E. 11. The declaration may be entitled before the day of demise; when the tenant appears he accepts the declaration as of the term. The declaration may be delivered after the essoin day and before the first day of full term, R. T. 1 W. 4, r. VII.

(*c*) The venue in the margin is immaterial if it be laid rightly in the body of the declaration; Doe d. Goodwin *v.* Roe, 3 Dowl. P. C. 323.

(*d*) The supposed original writ is not to be recited; Reg. Gen. Hil. T. 2 W. 4, reg. 4.

(*e*) This is to be the name of the real claimant, who must have the legal title and right of possession; see *ante*, 782, note (*e*). When the demises should be *several*, see id. In cases of doubt, insert counts on the demises of different persons probably having the legal title.

(*f*) This must be a day after the right of entry of the lessor of the plaintiff had accrued, and when he would have been competent to make the supposed demise to John Doe; Goodtitle *v.* Galloway, 4 T. R. 680. Where the title accrued some time back, it is usual and prudent to insert two counts on the demise of the same party, one laying a day just after the right first accrued, the other just before the day the declaration is delivered. The record and judgment in ejectment, which of course contain the declaration, are evidence (see *ante*, 760, "Mesne Profits") of the lessor of the plaintiff's title (from the day of demise laid) in the subsequent action for mesne profits, which is the reason why the former count should be adopted; see further *ante*, 782, note (*a*); Ad. Ej. 3d ed. 12.

(*g*) Describe the premises fully, adopting only such parts of the above description as applies. Ejectment lies in general only for corporeal hereditaments, of which the sheriff can give possession; Ad. Ej. 3d ed. 18, &c. The word "tenement" is therefore improper; id. 25; see further forms in 3 Chit. Pl. and notes. Ejectment for a "tin-bound;" Doe *v.* Alderson, 1 M. & W. 210.

*Notice to Appear, to be subscribed to Declaration.*

Messrs. C. D. and E. F. (*k*)

I am informed that you [*if several tenants state*, "or some of you,"] are in possession of, or claim title ["or one of you is in possession of, or claims title"] to the premises in this declaration of ejectment mentioned or to some part thereof, and I being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear in next —— term, [*or, if the premises lie in London or Middlesex*, "on the first day," *or* "first four days" "of next —— term," (*i*)] in her majesty's Court of Queen's Bench wheresoever (*k*) her majesty shall then be in England, [*or in the Common Pleas*, "in her majesty's Court of Common Bench at Westminster,"] by some attorney of that Court, and then and there, by rule of the same Court, to cause yourself [*or* "yourselves or some of you,"] to be made defendant [defendants] in my stead, otherwise (*l*) I shall suffer judgment to be entered against me by default and you will be turned out of possession. Dated this —— day of —— A. D. —— [*day of service.*]

Yours, &c.

Richard Roe.

2. *The like with Two or more Counts or Demises.* (*m*)

*Proceed as in* Form 1 *to the asterisk.*] And whereas also the said —— [*or* "one ——,"] heretofore, to wit, on the —— day of —— in the year of our Lord ——, in the parish aforesaid in the county aforesaid, had demised to the said John Doe —— *other* messuages [*&c. as before,*] with the appurtenances, situate and being in the parish aforesaid in the county aforesaid, to have and to hold the same to the said John Doe and his assigns thenceforth for the term of —— years thence next ensuing and fully to be complete and ended; by virtue of which said several demises, the said John Doe entered into the said several tenements, with the ap-

(*k*) The notice should be addressed to the tenant, or under-tenants (if any), in actual possession. It seems to be unnecessary to state the christian name of the tenant; and that, if stated, a mistake is unimportant, there being an affidavit that the person served is the person intended; Doe d. Warne *v.* Roe, 2 Dowl. P. C. 517; Doe d. Frost *v.* Roe, 3 Dowl. P. C. 14, 563; 1 H. & W. 217; 2 id. 567; Doe d. Stainton *v.* Roe, 6 M. & Sel. 203; Arch. Ch. 5th ed. 639. Where there are several tenants, the notice is usually addressed to all, but each copy may be addressed only to the particular tenant served; id.; Doe d. Field *v.* Roe, 1 H. & W. 516.

(*i*) Ch. Arch. 5th ed. 639; Tidd, 9th ed. 1208. A notice to appear "in due time," Doe d. Forbes *v.* Roe, 2 Dowl. P. C. 420, or "in eight days after Hilary," instead of Hilary term generally, Lackland *v.* Badland, 8 Moore, 79, is bad. As to the notice in particular cases, see Forms 7 and 8, *infra.*

(*k*) The omission of the words "wheresoever, &c.," not material; Doe d. Thomas *v.* Roe, 2 Chit. R. 171.

(*l*) A notice omitting to state this consequence, held defective, but amended on terms; Doe d. Darwent *v.* Roe, 3 Dowl. P. C. 336.

(*m*) See *ante*, 784, notes (*e*) (*f*). As to costs of issue found for defendant; Doe d. Smith *v.* Webber, 1 H. & W. 10.

purtenances, and became and was possessed thereof for the said several terms so to him thereof respectively granted as aforesaid; and the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the day and year last aforesaid, with force and arms &c., entered into the said several tenements with the appurtenances, in which the said John Doe was so interested in manner and for the several terms aforesaid, which are not yet expired, and ejected the said John Doe from his said several farms and other wrongs, [*conclude as before, adding notice to appear.*

### 3. *Declaration in Ejectment in the Q. B. by Bill.* (*n*)

In the Queen's Bench.

—— Term [*as in* Form 1.]

—— (to wit.) John Doe complains of Richard Roe, being in the custody of the marshal of the Marshalsea of our lady the queen, before the queen herself, of a plea, for that one —— on [*&c. proceed as in* Form 1 *or* 2, *as the case may be, to the alia enormia, and then conclude as follows,*] and other wrongs to the said John Doe then and there did, against the peace of our lady the queen, and to the damage of the said John Doe of £100; and therefore he brings his suit, &c.

Pledges (*o*) to prosecute. { John Den and Richard Fen

*Add the notice to appear, as ante,* 784, *Form* 1, *except that the tenant is to be required to appear* "in her majesty's Court of *Queen's* Bench *at Westminster*," *omitting* "*wheresoever*," *&c.*]

### 4. *Declaration, &c. in the Exchequer.*

In the Exchequer of Pleas.

—— Term [*as in* Form 1.]

—— (to wit.) John Doe, a debtor to our sovereign lady the now queen, comes before the barons of her majesty's Exchequer at Westminster on the —— day of —— [*last day of the term preceding the time of service,*] in this same term, by —— his attorney, and complains by bill against Richard Roe, present here in Court the same day, of a plea of trespass and ejectment of a farm; for that, [*&c. proceed as in the preceding forms, but conclude thus:*] to the damage of the said John Doe of £100, whereby he is the less able to satisfy our said lady the queen the debts which he owes her majesty at her said exchequer; and therefore he brings his suit, &c.

Pledges, &c.

(*n*) It is usual to proceed in Q. B. by *original*, not by bill.

(*o*) T. Chit. Forms, 425; but pledges are omitted in the form in Chit. on Pleading, and the omission could not be taken advantage of.

Mr. —— [*the tenant or tenants in actual possession.*]

I am informed that you are in possession of or claim title to the premises in this declaration of ejectment mentioned, or some part thereof, and I being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear in my stead in next —— term, [*or in †London or Middlesex*, "on the first day," *or* "first four days" "of next —— term,"] in the office of pleas of her majesty's Court of Exchequer at Westminster, and then and there defend your title to the aforesaid premises or to such part or parts thereof as is or are in your possession, otherwise I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession. (*p*)

Dated this —— day of —— 18—.

Yours, &c.

Richard Roe.

### 5. *Declaration and Notice to appear on a Vacant Possession, and the Tenant's Abode being unknown.* (*q*)

[The declaration in this case is the same as in other cases, except that the plaintiff and defendant, as well as the lessor of the plaintiff, are the real parties and are named, and instead of the usual notice to appear and plead, use the following, which should be addressed to the late tenant (*sed vide* Ad. Ej. 200, *id.* 396, 397):—"Take notice, that unless you appear in Her Majesty's Court of Queen's Bench [*or*, "C. P." *or* "Exch. of Pleas"] at Westminster in next —— Term [*or, if in London or Middlesex* "within the first four days," *or* "on the first day" "of next —— term"] at the suit of the above named plaintiff A. B. and plead to this declaration in ejectment, judgment will be thereupon entered against you by default. Dated [*&c.*]

Yours, &c.

—— Plaintiff's Attorney.

[See Tidd, App. 181; Chit. Forms, 3d ed. 462; 3 Chit. Pl. 5th ed. 888; 6th ed. 632: Ad. Ej. App. 396, 397; Imp. K. B. 8th ed. 616.]

### 6. *Declaration by Landlord against Tenant under stat.* 4 *Geo.* 2, *c.* 28, *on Forfeiture by Nonpayment of Rent, and there being no sufficient distress, &c.*

[The forms of the declaration and notice are the same as usual, whether the premises be tenanted or not, as the statute allows a copy of the declaration to be affixed on the premises, the notice being addressed to the

(*p*) See form, Tidd, App. 189; Ch. Forms, 3d ed. 425. But in 3 Chit. Pl. 5th ed. 888, 6th ed. 632, the form is directed to be as in Q. B. or C. P. except in describing the Court.

(*q*) See the practice and when applicable in this case, Ad. Ej. 199, 3d ed.; Woodf. by Harr. 827; Ch. Arch. 5th ed. 668.

last tenant in possession. See 2 Chit. Arch. Pr. 5th ed. 671; Woodf. by Harr. 2d ed. 728; Ad. Ej. 3d ed. 162; Tidd, 9th ed. 1197.]

### 7. *Declaration, &c. in Ejectment by Landlord against Tenant under stat.* 1 *Geo.* 4, *c.* 87. (*r*)

[*The declaration is the same as in ordinary cases, but the notice to appear, instead of the usual notice, should be as follows:*]

Mr. —— [*the tenant or tenants in actual possession.*] Take notice that, according to the statute in such case made and provided, you are hereby required to appear in her Majesty's Court of Q. B. [*or*, "C. P." *or, in the Exchequer*, "in the office of pleas in her Majesty's Court of Exchequer"] at Westminster [*or by original in Q. B.* "wheresoever her Majesty shall then be in England,"] on the first day of next —— term [*or, in country causes* "in next —— term,"] then and there to be made defendant in this action of ejectment, and then and there to enter into a recognizance by yourself and two sufficient sureties in such sum as to the said Court shall seem reasonable, conditioned to pay the costs and damages which shall be recovered in this action (*s*) if the Court shall so order.

Dated this —— day of —— 18— Yours, &c.

A. B. [*the landlord and lessor of plaintiff,*]
[*or*, "E. F. attorney for the said A. B."] (*t*)

### 8. *Declaration, &c. in Ejectment by Landlord against Tenant under* 11 *Geo.* 4 *&* 1 *Will. c.* 70, *s.* 36. (*u*)

In the Q. B. [*or*, "C. P." (*x*)]

On —— the —— day of —— [*the day next after the day of demise stated in the declaration*] in the —— year of the reign of Queen Victoria.

—— (to wit.) Richard Roe was attached to answer John Doe of a

(*r*) This statute applies only where the tenant held under a *written* demise, which has expired or been determined by notice to quit, and the tenant or undertenant holds over after a written demand of possession, and enables the landlord to require the tenant to appear to be made defendant, and give bail or security for the costs and damages, and the Court has power to enforce this requisition; see Ad. Ej. 3d ed. 367 to 376; Tidd, 9th ed. 1209, 1221; Ch. Arch. 675.

(*s*) This general form suffices, and it is not necessary to specify in detail the purposes for which the tenant is to appear, &c.; Doe d. Beard *v.* Roe, 1 M. & W. 360.

(*t*) "A. B. agent for the plaintiff" held sufficient; Doe d. Beard *v.* Roe, 1 M. & W. 360.

(*u*) This statute applies only to *landlords* who may acquire a right of entry against their *tenants* or undertenants on the expiration of the tenancy or by forfeiture, *in* Hilary or Trinity terms (being issuable terms) or *after* those terms and before the respective succeeding terms; and it enables such landlords "at any time within ten days after such tenancy shall expire, or right of entry accrue, to serve a declaration in ejectment intituled of the day next after the day of the demise in such declaration, whether the same shall be in term or vacation, with a notice thereunto subscribed requiring the tenant in possession to appear and plead within ten

plea [*&c. as in a common declaration in ejectment to the end, but instead of the usual notice substitute the following:*]

Mr. C. D. [*the tenant or tenants in actual possession.*] I am informed that you are in possession of or claim title to the premises in this declaration of ejectment mentioned, or to some part thereof, and I being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you by some attorney of her Majesty's Court of Q. B. [*or*, "Common Pleas"] at Westminster to appear and plead in the said Court *within ten days from the receipt hereof*, and then and there by rule of the same Court to cause yourself to be made defendant in my stead, and within the time aforesaid to plead to the said declaration, otherwise I shall suffer judgment to be entered against me by default, and you will be turned out of possession.

Dated this —— day of —— A. D. ——

Yours, &c.

Richard Roe.

## PLEA IN EJECTMENT.

In the ——

—— Term — Victoria.

C. D. *ats.* Doe on the demise [*or*, "demises"] of ——

And the defendant by ——, his attorney, [*or*, "in person"] says, that he is not guilty of the said supposed trespass and ejectment [*or*, *if there be several counts*, "trespasses and ejectments,"] above laid to his charge or either of them, or any part thereof, in manner and form as the said John Doe hath above thereof complained against him; and of this the defendant puts himself upon the country, &c.

### *Replication.*

In the ——

—— Term, [*&c.*]

Doe d. [*&c.*] *v.* C. D.

And the said John Doe, as to the plea of the defendant by him above pleaded, and whereof he hath put himself upon the country, doth the like. Therefore, [*&c.*]

days," and six days notice of trial before the commission day is to be given, with power to a judge to stay, &c. The statute does not apply to ejectments in London or Middlesex, nor to cases where the right accrues before the first day of Hilary or Trinity terms, though after the essoign days; see in general Tidd, N. P. 623 to 625; Ad. Ej. 3d ed. 376; Chit. Arch. 5th ed. 681.

(z) In Exchequer the form would be as *ante*, 786, Form 4, except that the declaration is to be specially entitled, and the notice will be to appear (in Exchequer) as above.

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